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OF THE

Nov. 14



Laws of England.

BY

THE RIGHT HONOURABLE

SIR JOHN COMYNS, KNIGHT,

LORD CHIEF BARON OF HIS MAJESTY'S COURT OF EXCHEQUER.

THE FOURTH EDITION, CORRECTED,
AND CONTINUED DOWN TO THE PRESENT TIME,

By SAMUEL ROSE,
BARRISTER AT LAW, OF LINCOLN'S INN.

IN SIX VOLUMES.

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Charles Walcott

CHARTERS.

(A) To whom the Property of them belongs.

IF a man seised in fee conveys land to another and his heirs without warranty, all the charters belong to the feoffee as incident to the land, whether they comprise warranty or not; for the feoffor has no use for them, but the feoffee must defend his title at his peril. *R. 1 Co. 1. a.*

And all charters belong to the feoffee without warranty, though they be not granted by the conveyance. *R. 1 Co. 1. a.*

So, in all cases, the charters, muniments, and evidences of land belong to him who has the inheritance of the land, as incident to it, if another person be not bound to warranty.

And therefore, if *A.* enfeoffs *B.* by the word (*dedi*), which imports a warranty during the life of the feoffor, after his death *B.* shall have all the charters. *1 Co. 2. b.*

So, if a man enfeoffs another with warranty, who dies without an heir, the lord by escheat shall have all the charters; for he is in the *possession*, and the feoffor is not bound to warrant him. *1 Co. 2. a.*

So, if a feoffment be to two and their heirs, the survivor shall have all the charters, &c. and not the heir of him who died; for he has no use for them. *1 Co. 2. b.*

So charters, &c. which are necessary to maintain his title to the possession, belong to him who has the land tho' another be bound to warranty; as if a thing which lies in grant, as a seignior, rent, &c. be granted with warranty, the grantee shall have the first deed; for it is necessary to make his title against the grantor himself, or any claiming under him. *R. 1 Co. 1. b.*

So, if a feoffment be made of land with warranty, the feoffee shall have court-rolls, &c. which concern the possession only, and not the title. *1 Co. 1. b.*

So, if the feoffor grants the charters to the feoffee by his conveyance, the feoffee shall have them, tho' the feoffor be bound to warranty. *1 Co. 1. b.*

If a grant be by indenture, every one ought to have his part; for every one who pleads it ought to produce it for that which belongs to him. *Co. L. 143. b.*

And therefore, if only one part be executed, it shall be deposited in the hand of a common friend. *Co. L. 143. b.*

But if a man makes a feoffment with warranty, without a grant

of the charters, he shall have all the charters and evidences which contain warranty, or are necessary to deraign the warranty *paramount*, or are material for the maintenance of the title of the land; for the feoffee relies upon his warranty. *R. 1 Co. 1. b. Co. L. 6. a.*

So the heir of the feoffor shall have them, tho' he has nothing by descent; for he may be vouched. *R. 1 Co. 1. b.*

So the feoffor shall have them, tho' the feoffee, as assignee, may vouch those who are bound to warranty *paramount*; for he may also vouch the feoffor if he pleases. *R. 1 Co. 1. b.*

(B) Detinue of Charters.

(B 1.) When it lies.

IF a man detains charters, which concern the inheritance of another, he may have *detinue of charters* against him. *Co. L. 286. b. [Vide Detinue (A). Vide Pleader, (2 X. 1, &c.)]*

So, if he detains a statute, obligation, release, articles of agreement, testament, &c. *Reg. 159. b.*

So a man may have *detinue* for any charters, which make his title sure. *F. N. B. 138. K.*

As, if *A.* lease for years, and afterwards confirm the estate to the lessee and his heirs; the heir shall have *detinue* for the lease; as well as for the deed of confirmation. *Ibid.*

If the donee in tail die without issue, the donor shall have *detinue* for the deed which the donee had. *F. N. B. 138. F.*

If a feoffment be to *A.* and *B.* and the heirs of *B.* and *A.* dies; *B.* or his heirs shall have *detinue* for his deed. *Ibid.*

So the issue in tail shall have *detinue* against the discontinnee, for the deed of entail. *F. N. B. 138. H.*

Detinue of charters bailed or found, in the life of the ancestor, ought to be brought by the heir, and not by the executor, or administrator. *F. N. B. 138. I.*

And it may be brought by the heir, tho' he has not the land: as if *A.* being enfeoffed with warranty, enfeoffs *B.* with warranty; the heir of *A.* may have *detinue* for the deed of the first feoffment. *F. N. B. 138. L.*

So the heir of the disseisee may have *detinue* for the charters, before entry. *F. N. B. 138. L.*

(B 2.) What shall be the Proceeding.

Detinue of charters concerns the realty, and therefore shall be brought only in *C. B.* *F. N. B. 138. B. C. Reg. 159. b.*

Or in the county by *justicies.* *F. N. B. 138. B. Reg. 159.*

And if it be brought in *B. R.* or any other court, a *superfedeas* lies. *F. N. B. 138. C.*

There shall be summons and severance, as in other real actions. *Co. L. 286. b.*

But a *capias* does not lie, nor process to outlawry, as in *detinue for goods.* *Co. L. 286. b.*

The declaration in *detinue for charters* ought to be certain, as well as *detinue for goods.* *Vide Pleader, (2 X. 2.)*

And therefore, it ought to shew the certainty of the charters demanded,

manded, and what lands they concern, except where they are in a bag sealed, or a chest locked, and then it is not necessary. *Co. L. 286. b. Reg. 160. a.*

So it ought always to mention the certain number. *Reg. 159. b. 160. a.*

And if they are in a chest or bag sealed, it may also mention the certainty, if it be known. *Bro. Ent. 148.*

At least it is proper to describe one of the charters with certainty, if it may be, and then the defendant cannot wage his law. *Co. L. 286. b.*

But if the declaration mentions the bag to be sealed, or the chest to be locked, it is sufficient, tho' it be not so; for it is not traversable. *Reg. 160. a.*

(B 3.) Plea in Detinue for Charters.

To *detinue* for charters the defendant may plead *touts temps pris*. *Vide Pleader, (2 X. 3, &c.)*

So the defendant may plead, that the charters were delivered by the plaintiff and a stranger *aqua manu*, upon conditions which he knows not whether they are performed, and pray that the stranger may be warned. *Vide Pleader, (2 X 8.)*

Vide Pleader, (2 Y 6.)

When Charters are allowed in Evidence.

Vide Evidence, (B 1, &c.)

C H A R T E R - P A R T Y.

Vide Merchant, (E 2, &c.)

C H A S E.

(A) Forest.

(A 1.) What shall be.

A FOREST is a place of wood and pasture distinguished *metis & bundis* for the custody of beasts and birds of the forest, (*viz.* hart, hind, hare, boar, and wolf,) the chase, (*viz.* buck, doe, fox, martrou, and roe,) and the warren, (*viz.* hare, coney, pheasant, and partridge,) and replenished with vert and venison, for the preservation of which peculiar laws, privileges, and officers belong. *Manw. 40. 4 Inst. 289. 298.*

A forest comprehends in it a chase, park, and warren. *Manw. 52.*

And may be made by act of parliament. *4 Inst. 301.*

Or the king, by commission to the sheriff or commissioners, may order, that they make a perambulation in such a country, and so much as appears to be convenient for a forest that they surround it by meers and bounds. *Manw. 57.*

And upon the return of such a commission into *Chancery*, the king may issue a writ to the sheriff reciting the former commission and return, and commanding him that he proclaim it throughout the country to be a forest. *Manw. 59.*

And if after a writ to proclaim it, and a return of it, the king grant proper officers and courts, it commences a forest. *Manw.* 60.

So the king may claim a forest by prescription. *4 Inst.* 301.

And it may be claimed by prescription in the lands of a subject, for it might have a lawful commencement. *Ibid.*

(A 2.) Who shall have it.

But none can make a forest, except the king. *Manw.* 71.

So the king cannot make a forest in the lands of a subject without his consent. *4 Inst.* 301. *Semb. cont. Manw.* 55.

And it is not proved a forest by being called a forest in records, &c. but by having courts, and officers, &c. *4 Inst.* 298. *R.* 12 *Co.* 22.

So by the *st.* 16 *Car.* 16. the meers, limits, bounds, &c. of every forest shall not extend beyond what were taken to be so. *20 Jac.* 1.

And no place shall be taken to be forest or within a forest where no justice seat, swainmote, or court of attachments had been held, verderors chosen, or regard made within 60 years before the reign of *Charles I.*

Yet the king may by exprefs words grant a forest to a subject. *Co. L.* 233. *a.* *Manw.* 72. 75. *per two Judg. cont.* 1 *Rol.* 112.

And by such grant of a forest *cum omnibus incidentibus, appendiciis, & pertinentiis*, the subject shall have the forests with all courts, and officers, except the justice in *Eyre*. *Manw.* 76. 78. 81. *R.* 2 *Cro.* 155. 1 *Bul.* 296.

So by exprefs words, the king may grant to a subject to have *jura regalia* to make a justice in *Eyre*, &c. *Manw.* 76.

But if a forest be parcel of a manor, by a grant of the manor *cum pertinentiis* to a subject, the forest does not pass. *R. Pal.* 60. 92.

(B) Chase.

What shall be.

A CHASE is the same liberty as a park, save that it is not inclosed. *Manw.* 52.

And therefore, a chase has no officers or courts, as a forest has. *Ibid.*

And offenders there shall not be punished by the laws of the forest, but by the common law, or statutes. *Ibid.*

A free chase may be claimed by grant, or prescription. 1 *Rol.* 112.

It may be claimed in his own wood, as appurtenant to his manor. *4 Inst.* 318.

Or within a forest. *Jon.* 278.

So, by prescription, it may be in the soil of another.

It may be claimed for red-deer by special licence. *Jon.* 278.

If the king makes a commission to inclose a forest and it be proclaimed a forest, it shall be only a chase till the proper officers and courts are granted. *Manw.* 60.

If the king grant a forest to a subject without the words *to have courts and officers of a forest*; it shall be only a chase in the hands of a subject. *Manw.* 80. *R.* 2 *Cro.* 155. *D. Pal.* 89, 90.

But none can make a chase, or a park within his own land, or elsewhere, without the king's grant. *Manw.* 56. 2 *Inst.* 199.

And if he does so, a *quo warranto* lies. *Manw.* 56.

So the owner of a chase shall be fined, if he kill a beast of the forest or refuse to drive back a beast of the forest out the chase. *Jon.* 278.

(C) Park.

A PARK is a territory inclosed, which has a privilege for beasts of chase, by prescription, or the king's grant. *Co. Lit.* 233. a. 2 *Inst.* 199. *Bridg.* 26.

And it may be within his own soil.

Or by the licence of the king, or the owner of the forest within the limits of a forest. *Manw.* 85. 89, 90. *Bridg.* 26.

[But such as would purchase a new park or warren should sue a writ of *ad quod damnum* out of *Chancery*; and the inquests shall be returned into the Exchequer, and if they pass for him that purchased the writ, he shall make fine for having the park or warren, and it shall be certified to the chancellor or his deputy that he take a reasonable fine therefore and afterwards make delivery. *St. 27 Ed. 1. ft. 1. de libertatibus perquirendis.*]

And if such park in a forest be laid down for several years, it may afterwards be inclosed *de novo*. *Manw.* 82. *R. 2 Cro.* 156.

And the owner of the park may kill any beasts which he finds in his park, tho' they come out of the forest. *2 Cro.* 156.

But a park within a forest ought to be inclosed, to prevent beasts of the forest from coming into it. *Manw.* 90. *R. Bridg.* 26.

And the owner may dispark his park, if he grants or destroys all the venison, vert, or inclosure. *R. Cro. Car.* 60.

(D) Warren.

A FREE warren is a privilege, which a man claims by grant, or prescription, to have beasts of a warren in his land, or demesnes, *ita quod nullus intret ad fugandum vel capiendum quod ad warrennam pertinet.* 2 *Rol.* 812. l. 5. to 20.

A warren is a privilege distinct from the land, and by a lease of the land, without more, does not pass. *Dy.* 30. *in marg.*

Nor, by an alienation of the land, without saying, *cum pertinentiis.* *Dy.* 30. b.

Or, if it be said, *cum pertinentiis*, where he has a warren by grant, not by prescription. *Dy.* 30. b. *in marg.*

So it may be granted or claimed, within a free chase of the king. 4 *Inst.* 298. 12 *Co.* 22.

And the grantee may there build a lodge upon his own inheritance. 4 *Inst.* 298.

So it may be claimed in a forest of the king. *R. Manw.* 81. *R. 2 Cro.* 155. *Jen.* 280. 296.

And tho' it have not been used for many years, the prescription shall not be destroyed. *Manw.* 81. 2 *Cro.* 155. *Vide Liberties*, (C 2.)

If there be a warren by charter within his manor, he may make burrows, and build a lodge in any part of the manor *de novo*. *Manw.* 82. 12 *Co.* 22. *R. 2 Cro.* 156.

If it be claimed by prescription, he ought to make them in the ancient place. *Ibid.*

But a man cannot prescribe for a warren in the lands of a stranger, which are not within his seigniority. 2 *Rol.* 265. l. 52.

And if the king grants to B. a warren within his manor, he shall have it only in the demesnes, not in the land of the freeholders. *Cro. El.* 463.

So none can make a warren in his own land without the king's licence, because he cannot appropriate to himself *feras natura*, which are *nullius in bonis*. 2 *Rob.* 812. l. 25. 11 *Co.* 87. b. 2 *Inst.* 199.

(E) Beasts of the Forest, and Chase.

THERE are five beasts, which are properly beasts of forest, or venary; viz. the hart, hind, hare, boar, and wolf. *Manw.* 91. 8 *Co.* 138. b.

The hart is so named when in his sixth year, being called in the first year, *hindcalf*, or *calf*, in the second *broket*, in the third *spayard*, in the fourth *flaggart*, in the fifth *flag*, in the sixth *hart*. *Manw.* 98.

After being chased by the king, it is an *hart royal*; and if a proclamation goes for his return to the forest after the chase, a *hart royal proclaimed*. *Manw.* 99.

The hind in the first year is called *calf*, in the second *brocket's sister*, in the third *an hind*. *Manw.* 100.

The hare is a *leveret* in the first, *an hare* in the second, and a *great hare* in the third year. *Ibid.*

The boar in the first year is a *pig of the sounder*, in the second *an hog*, in the third *an hog spear*, in the fourth *a boar*. *Ibid.*

So there are properly five beasts of chase, or park; viz. buck, doe, fox, martrou, and roe. *Manw.* 94. *Co. L.* 233. a. 8 *Co.* 138. b.

Every beast of forest, and chase is properly called venison (*venatio*). *Manw.* 111.

And therefore, if any kill an hare within a forest, he shall answer for a trespass upon the venison of the forest. *Ibid.*

And every trespass to the forest is to the vert, or venison. *Manw.* 112.

(F) Beasts of the Warren.

SO beasts of warren are properly two; viz. hare and coney. *Manw.* 95.

But *Co. L.* 233. a. names a roe to be a beast of warren. Hare and coney are named. 8 *Co.* 138. b.

The fowls of warren are only pheasant and partridge. *Manw.* 95. 8 *Co.* 138. b.

But *volucres campestris*, as quail, rail, &c. and *silvestres*, as woodcock, &c. and *aquatiles*, as herne, mallard, &c. are also named fowls of warren. *Co. L.* 233. a.

But the lord of a manor may prescribe, for himself and his tenants, to take fowl in the warren of another. *R. 3 Mod.* 246.

So he, who has a warren in a forest, must keep it well inclosed, that the conies do not escape into the forest. *Jon.* 296.

(G 1.) Meers of a Forest.

EVERY forest and chase ought to be distinguished by meers and limits, without which it cannot be a forest. *Manw.* 48. 128. 4 *Inst.* 289. 317, 318.

And the meers are parcel of the forest. *Manw.* 131.

And by the *st. de ass. & conf. for.* 6 Ed. 1. *Omnes meta foresta sunt integra domino regi.* *Manw.* 130, 131.

And

And therefore, every beast of forest killed in the highway, river, &c. being the meers of the forest, shall be an offence of the same nature as if he was killed within the forest. *Manw.* 131.

[But the king has no other interest in the soil of such highway, &c. but that arising from the jurisdiction of the forest. 4 *Inst.* 318.]

[And there are two kinds of metes and bounds, the one inclusive as to jurisdiction, such as highways, &c. the other exclusive in that respect, as churches, church-yards, chapels, mills, houses, trees, &c. which bound the forest, but are not within the jurisdiction. 4 *Inst.* 318.]

But a manor, land, wood, &c. within the meers of the forest, by the king's charter may be exempted out of the regard of the forest. *Manw.* 133.

Yet it shall not be exempted by prescription; for by the *st.* 6 *Ed.* 1. meers are established, and there can be no prescription since. *Jon.* 271.

(G 2.) Perambulation.

When a *perambulatione facienda* lies, *Vide Pleader*, (3 G.)

(H) Hunting, or Hawking in a Forest.

(H 1.) Who may do it.

NONE can hunt, or hawk within a forest, except the king, or by the king's warrant or authority. But the king himself may do it.

So by *charta de foresta*, 9 *H.* 11. an archbishop, bishop, earl, or baron coming to the king, at his command, or in return by a forest, may take and kill one or two deer there by view of the forester, or, if he be absent, he shall blow an horn.

So every one, who has a licence from the king or a subject to hunt, &c. within his forest, chase, park, &c. may do it. *Manw.*

Tho' the licence be only by *parol.* *Manw.* 289.

So, if he is entitled to have a deer, &c. as a fee incident to his office; for that is a licence in law. *Manw.* 285.

So every one, who has a grant or charter, of the king, allowed in the *Eyre* for hunting or hawking within a forest. *Manw.* 275.

And if the licence be *for hunting, killing, and carrying away*, he may hunt there with servants and others; for he has an interest in the thing. *Manw.* 278. *R.* 13 *H.* 7. 13. *a. b.*

So, if he has a warrant to a forester, &c. *to deliver him a buck*, he may with himself and servants hunt the buck with the forester. *Manw.* 279. *R.* 13 *H.* 7. 13. *a.*

If he has a licence *for him and his servants to hunt at his pleasure*, he may also kill and carry away; for the licence for the servant imports an interest in the thing. *Manw.* 279, 280.

(H 2.) Who not.

But none can hunt, or hawk within a forest without the king's authority. *Manw.* 275.

Tho' it be within his own land, or manor in the forest. *Manw.* 276.

So every one, who receives within a forest a malefactor in the forest or venison of the king, knowing him to be so, will be a principal trespasser. 4 *Inst.* 317.

So a bishop, or baron cannot hunt there, except in his journey to the king, by his command, and in view of the forester, or when he sounds an horn. *Manw.* 276.

So an officer, who is entitled to a deer for his fee, &c. must have a warrant; and if the forester, &c. refuse or omit to deliver it, he may hunt by himself and his servants, but not before serving the warrant upon the forester. *Manw.* 284.

So, if any one, who has the king's licence or warrant, does not pursue his licence, it will be a trespass *ab initio*. *Manw.* 277. 280. 288.

As, if the licence be for killing a buck, &c. he cannot kill another deer. *Manw.* 277.

If it be only for killing, he cannot afterwards carry it away. *Manw.* 277. 279.

If it be to a knight, &c. for hunting, without more, he cannot hunt with his servants, or other company; for it is a matter of pleasure only. *Manw.* 278. R. 13 H. 7. 13. b.

Or, for hunting and killing for the honour of the owner. *Manw.* 277.

Nor can he assign his licence to another. *Manw.* 278, 279.

So a licence for hunting in a chase, park, or warren must be pursued in the very manner. *Manw.* 277, &c.

(H 3.) By whom a Licence may be given.

So none can hunt, &c. within a forest, unless he has a licence from the proper person; for a licence from the forester, keeper, &c. does not avail. *Manw.* 281.

But the licence must be by the king himself. *Manw.* 280, 281.

Or by prescription, which supposes a grant of the king; as where an officer has a buck, &c. as a fee.

So justices in *Eyre* may give licence to any to hunt, &c. within his own manor, or land in the forest. *Manw.* 281.

So a man, who by a charter, or grant of the king, has authority within a particular part of the forest, may give licence to another within such precinct. *Ibid.*

So, if a subject has a forest, he may licence another to hunt, &c. in it. *Ibid.*

(H 4.) How Hunting, &c. there shall be punished.

By the *const. Canuti.* 22, 23, 24, 25, (which are suspected, 4 *Inst.* 320.) the penalty of hunting in a forest was 10 s. for a freeman, double for killing, in another man double, in a villein, death. *Manw.* 3.

By the *st. Ch. de For.* 9 H. 3. 10. No man shall lose life or member for killing our deer; but if taken therewith and convicted for taking our venison, he shall make grievous fine; or, if he hath nothing, he shall be imprisoned a year and a day, and then delivered, if he can find sufficient sureties, otherwise abjure the realm.

By the *st. de Mal. in Parcis*, 3 Ed. 1. 20. If any be attainted for trespass in parks and ponds at the suit of the party, large amends shall be made, three years imprisonment, fine at the king's pleasure, and

and surety not to offend after; if not able to fine, or find surety, he shall abjure, &c.

If none sue within a year, the king shall have the suit.

So by *Ord. For.* 6 Ed. 1. *Si quis ceperit feram sine warranto in foresta, arrestetur, &c. infra metas foreste, & non deliberetur sine precepto domini regis, vel capitalis justiciarii foreste.* Manw. 291.

And therefore, every one taken in the manner within a forest may be arrested by the forester, and imprisoned till delivered by an *homine replegiando*, or a precept of the justice in *Eyre*. *Ibid.*

And if bail be given upon the *homine replegiando*, or such precept, he may afterwards be indicted and fined at the discretion of the chief justice of the forest, and imprisoned till payment of the fine, and giving surety for his good behaviour in the forest thenceforth. *Manw.* 293.

So he may be arrested within the forest, and imprisoned, if found in hunting there, tho' he takes or kills nothing. *Manw.* 291.

So, if he be found in the manner in any respect, viz. stable stand, dogdraw, blackbear, or bloody hand. *Manw.* 292.

As, if he be taken with a gun, dog, &c. to kill deer. *Ibid.*

Or, after killing it pursue with a dog, carry it on his back, or be stained with blood, tho' he be not seen in hunting. *Ibid.*

So, if he enter with intent to hunt, and if found with a bow, dog, &c. tho' he does nothing; for the will is taken for the deed. *Ibid.*

But the chief justice in *Eyre* by his warrant to a messenger cannot apprehend any accused upon oath before him of hunting in the forest, if he be not indicted, nor found in the manner. *R. Carth.* 78.

(H 5.) *By action at common law.*] So, for hunting in a chase of the king, or of another, he may be sued by an action at common law. *F. N. B.* 67. D.

So, for hunting in a forest, park, &c.

So, for hunting in his close, and killing a deer there. 10 H. 7. 6. b. 30. a.

And the plaintiff shall recover damages for the value of the deer, tho' no value is mentioned in the declaration, as well as for entering his close. 10 H. 7. 6.

So, for hunting in a park, he may be sued within a year, by an action upon the *st. W.* 1. 20. *de malefactoribus in parcis.* Reg. 80. b. 111. b.

And by the king, after a year and a day. Reg. 80. b.

And the plaintiff may sue for trespasses in several parks together. R. 13 H. 7. 12. b.

But an action does not lie upon this statute, except for hunting in ancient parks. By the better opinion. *Dal.* 60.

Nor, for hunting in a forest or chase. *Semb.* Reg. 80. b.

So, to trespass in a park, the defendant may plead a feoffment, &c. to A. before the trespass, and that he by the command of A. hunted, &c. 13 H. 7. 13. a.

A licence by the plaintiff to B. and the defendant as his servant with the parker took it. *Ibid.*

(I) The Purlieu of a Forest.

(I 1.) What shall be.

PURLIEU, or *purluy*, is a contraction or corruption of the word, *pourallée*, which imports a perambulation. *Manw.* 365.

For in the time of *H. 2. R. 1.* and *John*, many lands adjoining to the king's forests were incroached within the forest, which by *Charta de Foresta* 1. 3. made 17 *John*, and confirmed 9 *H. 3.* were to be disafforested, and afterwards by perambulations made in the time of *Edw. 1.* and *Edw. 3.* disafforested; and the lands so disafforested are named the *purlieu* or *pourallée*. *Manw.* 319. to 365. (a).

And therefore, the purlieu of a forest is land adjoining to a forest known by meers immoveable upon record, which was within the forest, but is now disafforested. *Manw.* 318.

And the purlieu is exempt from the forest; for it is *infra metas*, not *infra regard' forestæ*. *Manw.* 87.

The owner may cut down his wood, plow, or improve his land without licence.

But by *Ch. de For.* 9 *H. 3. 1. forestæ quas H. 2. afforestavit, &c. ad dampnum illius cujus boscus, &c. fuit, deafforestentur.*

And therefore the purlieu was disafforested only for the benefit of the owner, and as to others, it remains within the forest. *Manw.* 366.

[But the words *ad dampnum illius, &c.* were added only to shew the unlawfulness of the afforestation; in the 3d chap. which relates to the afforestations in the reigns of *R. 1.* and king *John*, these words do not appear, and consequently these latter afforestations are made void as to all men; and if the former be not so, a distinction must be maintained between the two classes. 4 *Inst.* 303.]

And the owner may suffer his wood to be now within the forest.

So beasts of the forest may haunt within the *purlieu*, and none can chase them there, but the owner of the soil.

And the owner of the soil cannot kill them. *Jon.* 278.

(I 2.) Who may hunt within a Purlieu.

(I 2.) *The owner of the soil.*] The owner of the land or wood, within a *purlieu*, may hunt with dogs beasts of the forest found in his soil, towards the forest; so that he does not forestall, or forestet them in their return.

And if he finds them in his own soil, he may chase them towards the forest by the land of others.

And every owner of land within a *purlieu* may chase them towards the forest with a small dog.

So if he be a *purlieu* man, viz. if he have a freehold of 40 s. *per annum* within the *purlieu*, he may chase them with a greyhound, or bigger dog. *Manw.* 371.

And he may kill them before they pass the limit, or brink of the forest.

And he may take the deer, &c. killed to his own proper use.

(a) Note; There is a distinction between *purlieu* and *pourallée*: the former meaning the place disafforested and exempted, the latter being the perambulation by which the disafforestation is made. 4 *Inst.* 303.

So if a dog fasten upon a deer, &c. before she gains *filum forestæ*, and she drags the dog into the forest, and there is killed, the owner may pursue, and take the deer out of the forest.

So if a *purlieu* man pursue deer towards the forest, and by an horn, &c. call off his dogs before they enter into the forest; he is no trespasser, though the dog pursue and kill the deer within the forest, if he himself does not enter the forest, nor take the deer.

But a man, who has land within a *purlieu*, cannot by gun, cross-bow, hay, or other engine, forestall or forest the beasts of the forest in their return to the forest. *Manw.* 384. 373.

Nor can he kill unseasonable game within the *purlieu*; as a deer of antler in winter, or doe in summer. *Manw.* 384.

Nor at an unseasonable time; as in the night, or *die dominico*. *Manw.* 380.

Nor in the *fence-month*, which begins fifteen days before *midsummer*, and ends fifteen days after *midsummer*. *Manw.* 381.

Nor above three days in a week. *Manw.* 381, 2.

Nor within forty days after the king has made a general hunting within the adjoining forest. *Manw.* 382, 3.

Or within forty days before the time proclaimed for the king's hunting within the forest. *Manw.* 383.

Or during the time when an officer of the forest is in the execution of a warrant for taking a deer, &c. within the forest adjoining. *Ibid.*

So he can hunt only with his own servants within the *purlieu*, and not with other company. *Manw.* 382.

(K) Common Nufance.

SO any thing, which will be a nufance by law, if done out of the forest, if it be done within it, will be a nufance to the forest.

As if one erect cottages there without licence; tho' it be for the poor of the parish. *Jon.* 269.

If he incloses a lane within the forest. *Ibid.*

If he sets up a ferry, where none was before; for the deer may be the more easily carried away. *Jon.* 274.

If he carries a gun in the forest with intent to kill deer. *Jon.* 275.

Or conceals the killing. *Ibid.*

If he burns heath, furze, &c. within the forest. *Jon.* 276.

If he builds a wall, whereby the highway is straitened. *Jon.* 277. unless it appear *per ministros forestæ quod est competens passagium*.

If beasts damage the wood of *B.* within a forest, tho' *B.* ought to maintain the fence; for the owner of the beasts ought to request *B.* to make up the fence; and if he does not, he ought to do it himself, and shall have an action upon the case for it against *B.* *Jon.* 277.

If he erects a windmill within the forest, tho' it be upon his own soil. *Jon.* 293.

But by a licence from the justices in *Eyre*, an inclosure may be made, a cottage erected and arrented *in perpetuum*, if the licence be *sedente curia*, otherwise it may be re-seized. *Jon.* 277.

(L) Purpresture.

SO if a man by building, inclosure, or using any liberty, or privilege, without warrant, incroach upon the rights of the forest, it will be purpresture and an offence to the forest,

(M) Other Offences in the Forest.

Keeping of Dogs not expeditated.

EVERY offence, which tends to the destruction of the forest, or the vert or venison of the forest, or is a breach of the laws of the forest, will be a nuisance to the forest. *Manw.* 266.

And therefore, not only the hunting, or killing of beasts of the forest which destroys the venison, *de quo vide ante*, (H. 1, &c.) and waste, purpresture, or assart, which destroys the vert (*de quo vide ante*, L, and *post*, N. 1, &c.) but any thing which tends to such destruction, and is prohibited by the laws of the forest, will be a nuisance to the forest. *Manw.* 267.

And therefore, by *Ch. de For.* 9 H. 3. 6. he whose dog is not found expeditated, shall be amerced 3s. and inquiry or view for lawing of dogs within the forest shall be made, when the regard is made, viz. every third year, by the view and testimony of honest men, and not otherwise.

And such lawing shall be done by the assize commonly used, viz. three claws of the forefoot shall be cut of by the skin. And, *ex pede*, this is called expeditating. *Manw.* 265. 255.

And therefore, without the king's grant, no person can keep a mastiff within a forest, unless he be expeditated; for the word dog is intended of a mastiff only. *Manw.* 249.

Nor any dog of the mastiff kind. *Manw.* 251.

Nor can he prescribe for it, without shewing the king's charter. *Manw.* 246.

Nor any dog for hunting. *Semb. Skin.* 100.

So without the king's grant, none shall keep a greyhound or spaniel within a forest, tho' it be expeditated. *Manw.* 246.

And the patentee cannot prescribe to be quit of lawing dogs, as an abbot, &c. was quit. *Jon.* 271.

The regardors must present every mastiff not expeditated, and the owner, at the court of attachments, and by the judgment of the court every one shall be expeditated, and the owner shall pay 3s. by which is meant that it shall be done *per visum proborum hominum*, as *Carta de For.* 6. directs. *Manw.* 253, 254.

And it shall be done by an officer appointed by the court. *Manw.* 254.

Who with a mallet and chissel smites off at once the three claws of the dog's forefoot. *Manw.* 255, 256.

And after such presentment, (and not before,) process shall be awarded for such amercement. *Manw.* 260.

And a person cannot disclaim the dog, without saying, who is the owner. *Manw.* 262.

But an inhabitant within a forest may keep a mastiff being expeditated, for the safety of his house and goods. *Manw.* 243.

And if such mastiff be *invenius super feram*, &c. *ipse cuius est quietus erit*

erit de facto. By the statute *De Ass. & Conf. Foresta*, 6 Ed. 1. 9. *Manw.* 243.

So a little dog *unde nihil est periculi* may be kept, tho' he be not expeditated. *Manw.* 245.

So by a special grant of the king, a mastiff may be kept within a forest, tho' he be not expeditated. *Manw.* 246, 247.

So also a greyhound, and a spaniel, &c. *Manw.* 246.

So by *Ch. de For.* 6. lawing of dogs shall not be done, but in places where it hath been accustomed since the coronation of *H.* 2.

And therefore a mastiff need not be expeditated within a chase. *Manw.* 257.

Nor within any place disafforested, after the disafforestation. *Manw.* 258.

So if a man be found to have several dogs not expeditated, he shall be amerced only 3 s. *Manw.* 263, 4.

So a man shall not be amerced, who is not the owner of the dog, tho' he took the dog by tort, or by bailment of *B.* who lives out of the forest, and keeps him in the forest; for *B.* shall be amerced for it. *Manw.* 263.

(N) Waste.

(N 1.) In cutting of *Vert*, or *Covert*.

(N 1.) *What shall be vert.*] **B**^Y the st. 6 Ed. 1. *Rast. Forest*, 21. *Vert* shall be reputed *Omnis arbor fructum portans vel non, & antiqua fraxinus in foresta & arabili.*

And therefore, all wood and underwood within the forest is esteemed *vert*. *Manw.* 120.

Hault boys, which is called *overt vert*, comprehends all great wood. *Manw.* 121.

Antient ashes, and holly trees. *Ibid.*

South (pro soubz) boys, which is called *nether vert*, comprehends all underwood. *Ibid.*

All bushes, thorns, gorse, &c. *Ibid.*

So all *hault boys*, or *south (pro soubz) boys*, within any demesne wood of the king is *special vert*. *Manw.* 124.

So, in the demesne of a subject, all wood which bears fruit. *Manw.* 126.

If any cut the *vert* of the forest within his own land without licence, it will be waste. *Manw.* 147.

(N 2.) *When cutting it is restrained.*] By *Ch. de For. Regis Canuti*, 28. *Bosco & subbosco nostro sine licentia primariorum foresta nemo manum apponat.*

And if any offend in cutting of *vert* within the demesnes of the king, the cart and horses which carry it away are forfeited, and he shall be fined to the value of the wood cut. *Manw.* 124.

Per leges de For. Regis Canuti, si quis illicem aut arborem, quæ victum feris suppeditat, sciderit, propter fractionem regalis chaceæ emendet regi 20 s. And by *Charta de For.* 4. shall answer for waste, purpresture, and assart hereafter made.

Per Ordin. de For. 6 Ed. 1 *Rast. Forest*, 21. *Siquis extra dominicum infra regardam (viz. out of the demesne of the king, and within the precinct*

precinā in the forest,) *prostermit quercum, sine visu aut liberatione forestarii, aut viridari debet attacharii per 4 plegios & per visum viridariorum quercus appreciari.*

And therefore, a man cannot cut wood in his own land within the forest, or destroy the coverts, without a view of the forester, and licence of the justices in *Eyre*. *Manw.* 136.

If it be for fire, it may be cut by view of the foresters or verderors. *Jon.* 268.

And this is implied by the *st.* 1 *Ed.* 3. 2. which enacts, That any, having wood of his own in the forest, may take the same, without being attached by an officer of the forest, so as he do it by the view of the foresters.

Tho' it escheated to the king, and be then held by the king's patent; for the patentee shall be subject to the laws of the forest. *Manw.* 136.

So he cannot give, or sell his wood within the forest to another, without a warrant from the king, or the justices in *Eyre*. *Manw.* 137. And this *per Ord. de For.* 6 *Ed.* 1. 6. *Jon.* 270.

Or make charcoal of the wood there. *Manw.* 138.

So he cannot cut for sale, without a writ of *ad quod dampnum*. *Jon.* 268.

So a licence by the justice in *Eyre* ought to be *sedente curia*, or after a writ of *ad quod dampnum*. *Jon.* 209.

And if the officer gives a certificate, that the cutting was no prejudice, when it was a prejudice, he shall be fined. *Jon.* 274.

So *per Ord. de For.* 6 *Ed.* 1. 6. *Liberatio housebote & haybote fiat prout boscus pati potest*: And therefore he cannot take it without the delivery of the foresters. *Manw.* 137.

So he cannot make a woodward, without a prescription for it. *Manw.* 138.

(N 3.) *When not.*] But in a forest and chase in the hands of a common person, the owner of the soil may cut his wood, without the licence or view of the forester, if sufficient *vert* be left. *R.* *Manw.* 81. *R.* 12 *Co.* 22. 2 *Cro.* 155.

So in a free chase of the king. *R.* 12 *Co.* 22.

So by prescription, a man may cut timber in his own wood within the king's forest, without a view of the forester. *Manw.* 82. 135 *in marg.* 12 *Co.* 22, 23. *Dub.* *Jon.* 275, 6. *R. cont.* *Jon.* 290. *Vide Prescription*, (F 3.)

So he may take housebote, haybote by the view of the forester, without a licence of the justice in *Eyre*. *Manw.* 137. 144.

So an officer of the forest may prescribe to have so much wood, to be assigned by the woodward within the forest, for his fuel. *Semb. Sav.* 5.

So upon request to the justice in *Eyre*, an *ad quod dampnum* goes to inquire what damage the cutting will be, and the quantity and value of the wood, and upon the return of the writ to the *Chancery*, or to the justice in *Eyre*, he shall give a licence to the owner to cut, upon a recognizance to make fences for seven years. *Manw.* 140.

So the justice in *Eyre*, without an *ad quod dampnum*, may write by his warrant to the officers of the forest, and upon their certificate that it is no damage, grant a licence to the owner to cut his wood. *Manw.* 142.

Vide post. (N 8.)

(N 4.)

(N 4.) What other Privileges the Owner shall have.

So by *Ch. de For.* 9 *H.* 3. 13. Every freeman shall have in his own wood ayres of hawks, &c. and the honey there found.

By *Ch. de For.* 9. Every freeman may take agistment in his own woods in our forest, and his pawnage; and may drive his swine through our demesne woods to agist in his own or elsewhere, and shall not lose them if they tarry one night in the forest. *Vide post*, (O 1, &c.)

By *Ch. de For.* 12. He may make his own wood, land, or water in the forest, mills, springs, pool, marle, pits, dikes or arable ground without inclosing it, so as it be not to the annoyance of his neighbours.

(N 5.) Privilege of the King in the Wood, or Land of a Stranger.

The king, or the owner of a forest, by his officers, may cut brouse wood for the deer in winter, within the wood of any, *infra regardam forestæ.* *Manw.* 138.

(N 6.) In his own Wood, or Land.

So the king, in his wood, or lands within his own forest, chase, or park cannot, by commission of the treasurer, or the *Exchequer*, sell any coppice or wood, (except windfalls, roots, and dead trees,) without the licence of the justice in *Eyre.* *R. Manw.* 145.

Nor can cut dead trees, or carry away windfalls, &c. except at the proper season, by the view of the officers of the game. *Ibid.*

And therefore, before fall of the king's wood, there shall be an *ad quod dampnum* to the warden, or justice in *Eyre*, and returned by him. *Manw.* 146.

So before a warrant to cut for repairs, there must be a view and estimate of the *quantum.* *Jon.* 269.

So one may sell by the command of the king, without a regular licence for buying hay for the deer. *Jon.* 279.

So there shall be no sale of the king's wood by the justice in *Eyre*, without a commission of the treasurer and *Exchequer.* *R. Manw.* 143. 146.

Nor shall wood be cut by the justices in *Eyre*, or other officers for repair of lodges, pales, &c. (above two or three timber trees *per annum* in any forest, &c.) without allowance of the treasurer. *Manw.* 146. *Jon.* 279.

So the justice in *Eyre*, or other officer of the forest, cannot claim dotards, windfalls, &c. as a fee by prescription; for it was part of the king's inheritance, and ought to be sold by commission for the king's profit. *R. Manw.* 144.

So a grantee or lessee of the herbage or pannage of a park, &c. can take only the surplus (if there be any) after the deer are supplied. *Manw.* 144.

But the king's farmer or copyholder, may take timber according to the covenants of his lease, or the custom, by the view only of the forester. *Ibid.*

And the king may grant estovers in a forest, without the view of the forester. *Manw.* 144. *in marg.*

(N 7.) Inclosing of Wood.

By the common law, the inclosure of all wood, cut by the owner within

within a forest, ought to be made only for three years, *cum parva fossa & bassa haid secundum assisam foresta.* *Manw.* 82. 8 *Co.* 138. a. *R.* 2 *Cro.* 156. *Jon.* 278.

And if a deep ditch or high hedge be made, and continues for forty, years, if it were not so before, it may be destroyed and pulled down. *R.* 2 *Cro.* 156.

(N 8.) Waste in the Destruction of the *Vert*.

If the cutting of *vert* or covert within a forest be waste, the destruction of it will be more strongly so: And therefore, if a man cut his wood within the forest by licence, &c. and afterwards do not inclose the wood with a sufficient fence, whereby it be destroyed by beasts, the destruction of the wood will be waste. *Manw.* 149.

So if he cut by licence, but at an unseasonable time, whereby the wood will never grow afterwards. *Ibid.*

(N 9.) In affarting of his Land.

So it will be more heinous waste, if a man eradicate his wood, and convert his land to tillage, without licence; which waste is called *assart* from the word *effart*, which in *French* signifies to grub up. *Manw.* 155. 4 *Inst.* 306, 307.

So if a man convert his wood or land covered with broom, fern, heath, or other covert, to pasture and tillage, it will be an *assart*. *Manw.* 157.

So, if he convert meadow or pasture, within a forest surrounded with coverts, to arable, it will be an *assart*. *Ibid.*

So a grant to be quit of *assarts*, shall be only for those before committed. *Jon.* 271. 289.

(N 10.) How Waste shall be punished.

If a man commit waste within a forest by cutting, or destroying of the *vert* without licence, the wood or the land where the waste is done shall be seized into the hands of the king, till the owner replevy it, and make fine to the king. *Manw.* 151.

So if he assart any wood or land. *Manw.* 157.

Tho' the owner had an estate of inheritance in it.

Tho' he die before presentment of the waste; for the wood, or other land shall be seized, &c. till the heir replevy it, and make fine. *Manw.* 151. 158.

And if the owner or his heir will not pay his fine, the land remains in the king's hands for ever. *Manw.* 154. 158.

The fine shall be at the pleasure of the king, or the justice in *Byre*. *Ibid.*

But it is usually proportioned to the offence. *Manw.* 158.

And therefore, a presentment of waste in a forest ought to shew the nature of the waste, and by whom done, the quantity and value of the land, and where it lies. *Manw.* 152. 158.

So in lieu of a fine he may compound for an annual rent to the king, which ought to be entered upon the records of the forest. *Manw.* 160.

So over and above the fine, he shall pay the value of the corn growing. *Jon.* 269.

By the *ft. Ord. de For.* 6 Ed. 1. 4. *Siquis inventus fuerit in dominico regis assertando, &c. Corpus debet protinus retineri: Si extra dominicum infra rewardum, debet poni per 6 plegios; si alias, debet duplicare plegios; si tertio, corpus debet retineri.*

And therefore, every one who is guilty of *assart*, and is found in the manner, if it be in the demesne of the king, shall be imprisoned till he pay his fine. *Manw.* 159. 163.

If it be in his own land, &c. (and not the king's) for the first and second offence, he shall find sureties, and for the third, he shall be imprisoned till the fine paid. *Ibid.*

If he be imprisoned, he shall beailable only by the justice in *Eyre*, or his deputy. *Manw.* 159.

But the land shall not be absolutely forfeited for waste within a forest. *Manw.*

So, a man shall not be taken by a warrant of the Chief Justice of the forest, unless he be indicted, or found in the manner. *R. Carth.* 78.

And if timber of the forest be found in his yard, this is not a finding in the manner. *Per 3 Judg. Holt dub. Carth.* 79.

(O) Privilege within a Forest.

(O 1.) By Agistment.

AGISTMENT is, when a man agists, or drives beasts to depasture the herbage of a wood or land within the forest.

And by the *ft. Ch. de For.* 9. Every one may agist his own beasts (except sheep and goats) in his own wood or land within the forest, for a whole year at his pleasure. (*Vide ante*, N 4.)

If he has an estate in fee, or tail, for life or years, in his own right, or in right of another, he may do it by himself, or by his servant or agent. *Manw.* 193.

So, every inhabitant within a forest for hire may agist his commonable beasts in the demesnes of the king within the forest from fifteen days before *midsummer*, to fifteen days before *Michaelmas*, viz. to *Holy Rood* day, by assent of the verderors, foresters, and agistors. *Manw.* 180. 183.

And therefore, by *Ch. de For.* 8. A swanimote shall be holden fifteen days before the *Feast of St. John the Baptist*, when the agistors meet to fawn the deer. *Manw.* 183.

And there ought to be a commission from the justice in *Eyre* to the agistors, &c. to make an agistment, upon which they return what they do. *Manw.* 185.

But a man cannot agist his own land with goats and sheep, though the words of *Ch. de For.* 9. are general; for that would be to the banishment of the beasts of the forest. *Manw.* 193.

So, he cannot agist with the beasts of another.

If an inhabitant of the forest agist his beasts in the demesnes of the king without licence, he shall be fined. *Manw.* 188.

A foreigner, his beasts are forfeited. *Ibid.*

(O 2.) By pawnage.

So, by *Ch. de For.* 9. every one shall have pawnage in his own land (viz. the mast of his trees, with swine) at his pleasure, except in land adjoining to the land or wood of the king. *Manw.* 190.

And in his land or wood adjoining to the land or wood of the king, after the demesnes of the king are agifted. *Manw.* 191.

And he may agift with another's swine, after the king has agifted his demesnes.

So, every one, for hire, with assent of the verderors, foresters, and agiftors, may have pawnage in the demesnes of the king from fifteen days before *Michaelmas* to forty days after, viz. from *Holy Rood* day to *St. Martin's*. *Manw.* 184.

But, *per Ordin. de For. postquam dominicie hanc agistata sunt, licitum erit ei, qui boscum habet juxta dominicum boscum, tempore pannagii habere tot porcos quot per visum, &c. boscus pati possit*, and not before. *Manw.* 191.

(O 3.) By Common.

(O 3.) *When allowed.*] So every man, who has a right of common by prescription in the lands of the king, or another within a forest, shall have his common for all commonable beasts, notwithstanding the afforestation; for by *Ch. de For.* 1. The afforestation shall be, *salva communiâ de herbagio & aliis, illis qui prius habere consueverunt*. *Manw.* 217.

And therefore, every inhabitant within a forest may prescribe for common within the forest for his commonable beasts *levant* and *couchant* upon his antient tenement. *Manw.* 221. *Jon.* 283, 4.

So, an inhabitant of a town may prescribe for common, for commonable beasts *levant* and *couchant* within the same town. *Manw.* 222.

So, by special grant, a man may have common in a forest for beasts not commonable: as, for geese, goats, sheep, and hogs. *Manw.* 220.

So, he may prescribe for common there for sheep. *Cont. Manw.* 220. 222. *Semb. acc. Manw.* 227. *Acc.* 4 *Inst.* 298. *R. acc.* 3 *Bul.* 213. *R. Lut.* 81. *R.* 2 *Cro.* 155. *Acc. Poll.* 447. *Dub. Hard.* 87.

So, he may have common there *pour cause de vicinage*. *Manw.* 221. 224.

So, he may have common there in grofs, by special grant. *Ibid.*

Common of turbary.

So, he may prescribe for common in a forest, generally, without exception of the fence month. *Lut.* 81. *R.* 3 *Lev.* 98. 127. *Poll.* 443.

(O 4.) *When not*] But a man shall not have common in a forest, without charter or prescription, in respect of his inhabitancy there. *Manw.* 227.

So, if the inhabitants of a town may prescribe for common for commonable beasts *levant* and *couchant* in the same town, an inhabitant of an house newly built in the same town, being within the forest, shall not have common there; for such building is *purpresture*. *Manw.* 222.

So, regularly, a man cannot prescribe for common within a forest, for beasts not commonable: as, for geese, goats, or hogs. *Manw.* 220. 222.

Nor can he use common there with the beasts of a stranger. *Manw.* 223. *Jon.* 283.

Nor, within a fence month. *Jon.* 283.

So, a commoner ought not to sur-charge the forest. *Jon.* 282.

Nor

Nor fend his beasts with a staff-herd, who attends them. 2 *Jon.* 282.

So, by the disafforestation of the land, the common will be lost. *R. Hard.* 438. *Hale cont.* if the land was not well put within the forest at first.

[The right of common in the *New Forest* is absolutely taken away in the inclosed parts whilst inclosed, and continued in the waste parts, except in fence-month, (fifteen days before, and fifteen days after 24 *June*,) and winter-heyning (from 11 *November* to 23 *April*), and pannage is restrained to the time between 14 *September* and 11 *November*; and this tho' the whole 6000 acres is not inclosed. *Biddlecombe v. Kervell*, *H. 1 G. 3.* 2 *B. M.* 1117.]

(P) The Laws of the Forest.

THE laws of the forest differ from the common law. *Manw.* 486.

By *Ch. de For.* 9 *H. 3.* the laws of the forest are reduced to a certainty, which were before arbitrary at the will of the king. *Manw.* 487.

(Q) Officers of the Forest.

(Q 1.) Justice in *Eyre*.

THE chief officer of the forest is the justice in *Eyre*. *Vide Justices (F).*

So, all associated with him are called capital justices of the forest.

So, if the king grant a forest, without power to make a justice-feat, it will be only a chase. *R. 2 Bul.* 298. *Vide ante (B).*

And in a *quo warranto* to have a forest and justice-feat, if the defendant claim the forest, but disclaim to have the justice-feat, there shall be judgment against him. *R. 2 Bul.* 298.

(Q 2.) Verderor.

In every forest there are usually four verderors, so named a *viridi*, or *vert*. 4 *Inst.* 317. *Manw.* 403.

The verderor is a judicial officer of the forest, chosen by force of the king's writ in full county, and sworn to maintain the laws of the forest, and to view, receive, and inrol the attachments, and presentments of all trespasses within the forest, of *vert* and venison. 4 *Inst.* 292. *Manw.* 403.

And all the rolls ought to be in parchment, not in paper. *Jon.* 267.

And ought to be sealed before delivery; but one seal with assent of all is sufficient. *Jon.* 268.

(Q 3.) Regarder.

The regarder or ranger is a ministerial officer of the forest, sworn to make regard there as usual, to view and inquire of all offences within the forest in *vert* or venison, and of concealments, or defaults of the foresters, or other officers of the forest. *Manw.* 409.

And he shall be made by the king's patent, or by the chief justice in *eyre*, or, upon a writ to the sheriff to make a regard of the forest, he shall be chosen in the county. *Manw.* 409. *Jon.* 266.

If the presentments by the regarders are insufficient, they shall be fined; for by the articles sent to them with the writ of summons, they are directed what ought to be presented, and in what manner. *Jon.* 268. 274, 5.

(Q 4.) Forester.

The forester is an officer sworn to preserve the *vert* and venison within his walk, to guard the *vert* and venison there, not to conceal but to attach all offenders, and to present the offences and attachments at the next court of attachments, or swanimote. *Manw.* 428.

And to ride with the king, and conduct him in his hunting. *Jon.* 278.

To take care of the lawing of the dogs. *Jon.* 288.

[The forester may arrest any man who kills or chases any deer within the forest, if he be taken with the manner within the forest, or be indicted before the swanimote, and may detain him till he find pledges to appear before the justice in *eyre*, but if he offer sufficient pledges he ought not to be imprisoned. 4 *Inst.* 290.]

[And if then imprisoned he may have a writ of *habeas corpus ex debito justiciæ*: or he may be bailed by a writ *de homine replegiando*, directed *custodi foreste*, he finding 12 pledges. 4 *Inst.* 290.]

(Q 5.) Woodward.

A subject, who has land within a forest, according to usage, ought to have a woodward, and if he does not appear at the justice-seat, the wood shall be seized into the king's hands, till he make fine and replevy it, and if he do not replevy it within a year, it shall remain in the king's hands for ever. *Jon.* 266.

If wood, part of the king's demesne within a forest, be demised to another for years, the lessee shall find a woodward; and if he does not appear, the wood and office shall be seized. *Ibid.*

And after seizure, no claim of the owner shall be heard till he replevy the wood. *Jon.* 267, 268.

(Q 6.) Agistor.

The agistor is an officer within the forest, who ought to present trespasses made by beasts in the forest. *Jon.* 280. [*Vide* Sir Edward Coke's description of an agistor, which differs something from this. 4 *Inst.* 293.]

If the same person has several offices in the forest, those may be seized *que intendere non possit*. *Jon.* 266.

So, if a town, &c. has a patent to be quit of service in a forest, it must serve till its claim be allowed by the justices in *eyre*. *Jon.* 267.

If any present what does not belong to his office he shall be fined. *Jon.* 280.

(R) The Courts of the Forest.

(R 1.) The Justice-Seat.

[THE justice-seat is held before the chief-justice or his deputy or deputies, whom he is empowered to make by *st.* 32 *H.* 8. c. 35. and who by that statute are vested with the same powers as the justice himself. *Vide justices (F).*]

[But this court cannot be held but from three years to three years, and must be summoned at least 40 days before its sitting, and two writs issue, one to the sheriff to summon all who ought to attend within his county; which see 4 *Inst.* 310. The other to the warden *custodi foreste*

foresta domini regis vel ejus locum tenenti in eadem. Which latter consists of two parts: first, to summon all the officers of the forest, and that they bring with them all the records, &c. Secondly, all persons who claim any liberties or franchises within the forest, and to shew how they claim the same.]

At the justice-seat, after the commission read, the officers of the forest, freeholders, and all who ought to appear, are demanded, and then a jury out of the freeholders is sworn, and a charge given to them. *Manw.* 509.

But the court may adjourn to another place in the county before demand, and may be demanded there. *Jon.* 347.

All offences, which concern *vert* or venison within the forest, are inquirable at the justice-seat, and not elsewhere out of the forest. *Jon.* 267.

And therefore, all rolls of offences presented at a court of attachment, or indicted at a court of swanimote under the seal of the verderors, ought to be presented at the justice-seat.

And the matter of fact contained in such rolls, whereof any one is convicted by the same rolls, cannot be traversed nor discharged, except by matter subsequent consistent with the fact, which may be pleaded thereto at the justice-seat; as, a pardon, a release, &c. *R. Jon.* 347.

So, if the roll contain, that *A.* was indicted and convicted before the verderors at the swanimote of cutting trees within the forest, *A.* shall plead at the justice-seat, a grant of lands within the forest, upon which the trees grew. *Jon.* 347.

Otherwise, if the grant does not mention the trees to be within the forest. *Ibid.*

[But an indictment or presentment before the chief justice of the forest at a court of the justice-seat by a jury, and not found in the swanimote, may be traversed, 8 *Edw.* 3. *Itinere Pickering* 147. a. because it is presented but by one jury. 4 *Inst.* 291.]

So, the jury, charged at the justice-seat, ought to present all offences committed within the forest since the last justice-seat, and how they have been prosecuted, or punished by the officers of the forest. *Manw.* 509.

As, the cutting of trees, building of houses to the nuisance of the forest, &c. *Jon.* 348.

And the reeve, and four men of the towns ought to attend till presentment made. *Jon.* 297.

So, the justice-seat may fine for contemptuous words. *Jon.* 274.

Or, for words at the swanimote before the justice-seat. *Ibid.*

After presentment, the party may confess and submit to be fined. *Jon.* 268.

And he ought to plead presently, for the process is *de hora in horam.* *Jon.* 268.

If there be a claim at the justice-seat of any privilege or exemption, after the charter read, the court allows or disallows, without a demurrer, &c. by the attorney-general. *Jon.* 272.

Or, the party himself may disavow. *Jon.* 288.

So, if a claim be made and not prosecuted, it shall be disallowed. *Jon.* 297.

If the party prosecute his claim, he must make a good title to it.
Jon. 294.

If a judgment at the justice-seat be erroneous, a writ of error lies in
B. R.

So, if the justice-seat allows an unlawful claim, there may be redress, if the record be removed into *B. R.* by a *certiorari*, called a *venire facias recordum*. *Manw.* 526. 4 *Inst.* 294.

So, if it disallows a claim, which ought to be allowed, there shall be a writ *de libertatibus allocandis* directed to the justice of the forest.

(R 2.) The Swanimote Court.

The swanimote is derived from *mote*, which signifies a court, and *swaine*, which signifies a freeman; and therefore imports a court of freeholders within a forest. 4 *Inst.* *Manw.* 462.

In this court the verderors are the judges. *Manw.* 462.

And tho' the warden, or his deputy, or lieutenant, sometimes sit in court, yet they are not the judges there. *Manw.* 462, 463.

By the *st. Ch. de For.* 8. the swanimote court shall be held only *ter in anno*, viz. fifteen days before *Michaelmas*, about the feast of *St. Martin* in winter and in the beginning of fifteen days before the feast of *St. John the Baptist*.

And all the officers of the forest, and freeholders within the forest, ought to appear there. *Manw.* 467.

If any one does not appear, his default shall be enrolled, and he shall be amerced upon the oath of the officers by the verderors and steward of the forest; and the amerciamment shall be assessed, and afterwards estreated by the verderors to the chief warden or his deputy, or to the beadle of the forest, to be levied by distress; or the verderors may certify the default to the justices of the forest, who shall make a writ to the warden or sheriff to levy it, or may estreat it in the *exchequer*, and process shall issue to levy it. *Manw.* 469.

The distress shall be for the amerciamment for his default, and also that he appear at the next swanimote. *Manw.* 470.

It may be upon his goods or lands within the forest, or lands out of the forest, which belong to him as an officer of the forest. *Manw.* 471.

If it be returned by the chief warden or his lieutenant, that he has no lands or goods, whereby he may be distrained, there shall be a *testatum distringas* by the justices of the forest to the sheriff to distrain him within his county. *Manw.* 471.

CHATELS.

Goods and Chattels.

Vide Biens, per Totum. — *Chancery*, (4 W 5.) — *Prohibition*, (F 5.)
— *Trespafs*, (A 1.—B 4.)

Chattels Real.

Vide Biens, (A 1.) — *Chancery*, (4 G. 2, 5.)

Chattels Personal.

Vide Biens, (A 2.) — *Chancery*, (4 G. 1.)

CHESTER.

County Palatine of CHESTER.

Vide Franchises, (D. 4, &c.)

Chamberlain of CHESTER.

Vide Franchises, (D 5.)

Chief Justice of CHESTER.

Vide Franchises, (D 6.)

CHIMIN.

(A) Highway.

(A 1.) What shall be.

WHAT shall be said to be a private way, and what an highway, depends upon common reputation. 1 *Vent.* 189. *Vide post, (D 1, &c.)*

A way to a market, a great road, &c. common to all passengers, is a high-way. *Per Hale, 1 Vent.* 189.

A navigable river is in the nature of a highway.

And if the water alters its course, the way alters. *Per Thorp, 22 Aff.* 93.

If a high-way lies in an open field, and passengers use to turn out of the great track when it is foundrous, these outlets are part of the high-way. *R. 1 Rol.* 390. *l.* 10.

And if sown with grain, passengers may ride upon the corn. *Ibid.*

But if a man assigns a way, because the highway is foundrous, out of his own ground, that does not become the highway unless it be done by the king's licence upon an *ad quod damnum*. *R. Cro. Car.* 267. [*Vide 1 Bur.* 465.]

Tho' an inquisition upon an *ad quod damnum* finds, that it is no damage to the king to grant a licence; if the licence be not granted. *R. Cro. Car.* 267.

[A general way, and a private way by prescription, are inconsistent, and cannot be claimed together. *Chichester v. Lethbridge. C. P. E.* 11 *Geo.* 2. *Willes* 71.]

[Prescription for a right of way for *A. and others*, (not naming them,) is uncertain, and bad even after verdict. *Ibid.*]

[A prescriptive right of way for *coaches*, &c. is good after verdict. *Ibid.*]

(A 2.) To whom the Soil and Profits belong.

The king has only passage in the highway for him and his subjects. 1 *Rol.* 392. *l.* 3. *Bro. Chimin*, 9, 10.

But the freehold and soil belong to the lord of the leet. 1 *Rol.* 392. *l.* 5.

And he may have an action for digging the ground there. 1 *Rol.* 392. l. 8.

Yet the trees in a highway generally belong to the proprietors of the soil, *ex utraque parte*. R. 1 *Rol.* 392. l. 13. *Bro. Chimin*, 15. 1 *Brownl.* 42.

But the lord of the leet may prescribe for the trees there.

And by some it is said, that the trees belong to him. *Per Cur.* 27 *H. 6.* 8. a.

So, the lord of a rape may prescribe for all the trees in the highway within his rape, tho' he be not lord of the manor. R. 1 *Rol.* 392. l. 15.

If a man be owner of a close by which a highway lies, the trees belong to him. *Bro. Chimin*, 9.

[If a man sets out a highway, yet the property of the soil remains in him, and he may maintain trespass for resting the end of a bridge on it. *Lade v. Shepherd*, H. 8 G. 2. *Str.* 1004.]

[So, he may recover it in ejectment, subject to easements; and he has a right to the freehold, and all profits above and under ground, except only to the right of passage. 1 *Bur.* 143. 147.]

(A 3.) How it shall be used.

If a carrier carries an unreasonable weight with an unusual number of horses, it will be a nuisance to the highway, by the common law. *R. Mar. pl.* 210.

So, if a man erects a gate across a highway, it will be a nuisance.

Tho' it be not locked, but opens and shuts freely. *Per 3 J. Cro. cont. Cro. Car.* 184.

Or, if he puts his wood-stack in the street before his house, according to the antient usage in the town, and leaves sufficient passage for travellers. R. 2 *Cro.* 446.

(A 4.) How it shall be repaired.

If a highway wants repair, the parish of common right ought to repair it. *Mar. pl.* 62. 1 *Vent.* 90. *per Hale*, 1 *Vent.* 183. 189. [2 *Term Rep.* 106.]

[If there is a road thro' common fields from A. to B. an act of parliament for inclosing, &c. and the commissioners direct that there shall be a road from A. to B. thro' the allotment of C. D. who incloses the road on both sides, he is not bound to repair, but the parish remains liable. *Rex v. Flecknow*, H. 31 G. 2. 1 *B. M.* 461.]

And therefore an indictment against any persons of the parish, severally, shall be quashed. *Mar. pl.* 71.

[If a parish is indicted, it must be laid, that the road is within the parish, or that it is obliged to repair. *Rex v. All Saints*, P. 8 G. 2, *B. R. H.* 105. *Cowp.* 111.]

[The breadth of the road should appear, that the court may set a proper fine. *Ibid.*]

[The burthen of repairing may, from time out of mind, have been on separate districts of a parish for the several parts of a road lying within the respective districts. *Vid. Doug.* 421.]

[If a *township* is indicted for not repairing, it must be averred that time out of mind they have repaired. *Rex v. Marton*, T. 11 & 12 G. 2. *Andr.* 276.]

[And

[And in what manner they are *bound* to repair. 5 *Bur.* 2700.]

[By *st.* 13 *G.* 3. *c.* 78. *f.* 45. if the means pointed out by that act be not sufficient for the repair of the highways within the parish, township, or place within which such highways are, an equal assessment shall be made on the occupiers of lands, &c. within the parish, &c. by order of the justices.]

[And by *f.* 47. if any fine, issue, or penalty imposed on any parish, &c. be levied on any inhabitant, &c. of such parish, &c. on complaint of such inhabitant to the justices at their general or special sessions, such justices shall, by warrant, &c. cause a rate to be made for reimbursing such complainant.]

[If a parish consisting of two districts, which are bound to repair separately, be convicted for not repairing the road in one of the districts, the other district having no notice of the indictment, the court will consider it as being substantially the conviction of the one district; and if the fine be levied on an inhabitant of the other, will grant a *special mandamus* for a rate to be levied on the district bound to repair the indicted part of the road. *Doug.* 421.]

[If the inhabitants of a township, bound by prescription to repair the roads within the township, be expressly exempted by the provisions of a road act from the charge of repairing new roads to be made within the township, that charge must necessarily fall on the rest of the parish. 2 *Term Rep.* 106.]

[The presentment of the jury must say that the way is out of repair. *B. R. H.* 105.]

[If the indictment is for not *paving*, it is bad; they are not bound to *pave*, but to repair. *Ibid.*]

[If a parish lies in two counties *A.* and *B.* and the place out of repair in *A.* the inhabitants of that part of the parish which lies in *A.* must be indicted, and not the whole parish. *Rex v. Weston under Penyard*, *H.* 10 *G.* 3. 4 *B. M.* 2507.]

[If a parish be situate part in one county and the rest in another, and a highway lying in one part be out of repair, an indictment against the inhabitants of that part only is bad. The indictment should be against the whole parish. *Rex v. Clifton*, *H.* 34 *Geo.* 3. 5 *T. R.* 498.]

[The commissioners appointed by *st.* 6 *Geo.* 3. *c.* 78. (an act for dividing and enclosing certain lands in the parish of *C.*) which enacts that the public roads to be set out by them should be repaired in such manner as other public roads are by law to be repaired, and that the private roads should be repaired by such *person or persons* as they should award, have no power of imposing on the parish at large the burden of repairing any of the private roads set out in pursuance of the act. *Rex v. Cottingham*, *M.* 35 *Geo.* 3. 6 *T. R.* 20.]

[Under a turnpike act the trustees had power to turn roads through private grounds, making satisfaction to the owners; and if they could not agree they were enabled, on giving notice to the owners, to summon a jury to ascertain the damage, and to order such sum so ascertained to be paid to the owners. The court of *B. R.* quashed an inquisition of the jury, and an order of the trustees under this act, because it did not appear on the face of the proceedings that *any notice* had been given to the owners of the land. *Rex v. Bagshaw*, *T.* 37 *Geo.* 3. 7 *T. R.* 363.]

[The

[The same point with regard to the necessity of notice was decided in the case of *Rex v. Mayor of Liverpool*, T. 8 Geo. 3. 4 Bur. 2244.]

[Common highway is a good description, without saying foot, horse, or cartway; it is a highway for all things. *Rex v. Hatfield*, M. 10 G. 2. B. R. H. 315.]

[Indictment setting forth a highway leading from the hamlet of A. in the parish of B. to C. is good; and a certain part of it in the parish of A. aforesaid, leading from a house in said hamlet of A. to a place called, &c. containing, &c. is a good description of the part out of repair. *Rex v. Harrow*, P. 7 G. 3. 4 B. M. 2090.]

And an agreement with another, that he shall repair, does not exempt the parish. 1 Vent. 90. 189.

So, the king's grant does not exempt the parishioners. R. 3 Mod. 96.

But a man may be bound by tenure to the repair of an highway. 2 Sand. 161.

And the lien continues though he lays his land open to the highway. Per Keeling, 2 Sand. 161.

[In an indictment against a person obliged to repair by tenure, *ratione tenuræ* is sufficient, without *sue*; for it implies such tenure as makes him chargeable. *Rex v. Corrock*, T. 5 G. Str. 187.]

[But an indictment stating that particular persons ought to repair, without averring a special cause for charging them, is bad. 5 Burr. 2700.]

[If a person indicted for not repairing a road *ratione tenuræ* submit in order to have a small fine, he must pay the prosecutors costs. 1 Bl. Rep. 602.]

[The fine in this case is to be paid to the surveyor of the parish highways. *Ibid.*]

[If trustees under a road act turn a road through an inclosure, and make the fences at their own expence, and repair them for several years, they cannot be compelled to continue such repairs unless there be a special provision in the act for that purpose: and if no other provision is made by the act, the owners on each side are bound to repair the fences. 2 Term Rep. 232, 3.]

[By stat. 13 G. 3. c. 78. §. 23. Surveyor shall inform two justices, on oath, what roads are to be repaired by tenure, &c. and they shall limit a time for repairing them; if not done, they shall present it at quarter sessions, who may order prosecution at the general expence of the limit.]

[By stat. 13 G. 3. c. 84. §. 62. Turnpike trustees may agree with persons liable by tenure to repair, and make them reasonable allowance out of tolls.]

So, by prescription he may be bound to repair before his house. Mar. pl. 71.

So, if a man incloses his land in a common field, *ex utraque parte* of an highway, he shall be bound to the repair by reason of the encroachment, tho' he was not liable before. R. Cro. Car. 366. 1 Rol. 390. l. 30. Jon. 296.

And he ought to make a good way, and maintain it for all carriages as well as horses, at his own charges; and it is not sufficient that it is better than it was before. R. Cro. Car. 366.

So, if a man incloses against one side of the way only, where there was

was an ancient inclosure, against the other, he ought to repair the whole. *Per Keeling, 1 Sid. 464.*

But if a man incloses only one side, where there was no inclosure on the other, he shall be bound to maintain only a moiety of the way. *1 Sid. 464.*

And if a man, bound by reason of inclosure, lays his land open again, he shall be excused. *Per Keeling, 2 Sand. 160.*

The occupier is bound to the repair of the highway, not the owner. *R. 1 Rol. 390. l. 50.*

[*B. R.* will grant information against inhabitants for not repairing. *Rex v. Chedinfold, M. 9 G. 2. B. R. H. 159.*]

[So, if they have repaired only with faggots covered with earth, when they might have had stone two miles off. *Ibid.*]

(B 1.) Bridges in an Highway.

NONE can be compelled to make a bridge in an highway, where there was not one before, unless by act of parliament. *2 Inst. 701.*

By the *ft. Magna Charta, 9 H. 3. 15. Nulla villa nec liber homo distringatur facere pontes, nisi qui de jure facere consuevit temp. H. 2.*

So, no one can erect a public bridge, without licence, and an *ad quod damnum. 1 Sal. 12.*

So, a county cannot change a bridge from one place to another, without an act of parliament. *R. Mod. Ca. 307.*

(B 2.) How repaired.

(B 2.) *By whom.*] By the common law no one was bound to the repair of a bridge, but by tenure or prescription. *2 Inst. 700.*

And if no one was bound by tenure or prescription, it should be repaired by the whole county. *2 Inst. 701. 1 Rol. 368. l. 10. Cro. Car. 365.*

Or, if it lies in a franchise, by the whole franchise. *2 Inst. 701.*

Or, if part in one county or franchise, and part in another, each ought to repair as much as lies in it. *2 Inst. 701.* And this is now confirmed by *ft. 22 H. 8. 5.*

Tho' the sessions charge only one vill for the whole. *R. 1 Sal. 359.*

But the terre-tenants on each side of an highway are not bound to repair a bridge in it. *2 Inst. 700.*

So, if a man erects a public bridge, he is not bound to repair it. *2 Inst. 701. 1 Sal. 359.*

Nor if he voluntarily repairs it once or twice; for that is only evidence against him of a lien by prescription, if he cannot shew who ought to repair. *2 Inst. 700.* [The county or riding must repair it. *2 Bl. Rep. 685.*]

So an usage by the ancestor does not bind the heir to repair, without a lien and affets. *Ibid.*

Yet a corporation sole or aggregate may be bound to repair by usage and prescription, without more. *2 Inst. 700.*

And if a man, bound by tenure, sells part of the land to one, and part to another, each may be charged for the whole. *Jon. 273. R. 1 Sal. 358.*

Though

Though the land bound comes afterwards to the king. *R. 1 Sal. 358.*

But he shall have a writ *de onerando pro rata portione* against the other. *2 Inst. 700. Hard. 131. Dan. 744.*

So, if an owner of a mill make a channel to it across the highway, and a bridge there, which is used as a public bridge, he shall be bound to the repair. *R. 1 Rol. 368. l. 15. Semb. Cro. Car. 365.*

Yet a private bridge, which comes to the public benefit and use, shall be repaired by the public. *Mod. Ca. 307.*

[So, where a bridge for carriages was built in the room of a foot-bridge which had been immemorially repaired by a township, the county was held liable. *5 Burr. 2594.*]

(B 3.) Remedy for not repairing.

(B 3.) *By the common law.*] If a bridge wants repair by the common law, the remedy was by presentment before *B. R.* or justices in *Eyre.* *2 Inst. 701.*

Or, before commissioners of *Oyer and Terminer.* *Ibid.*

Or, before the sheriff in his tourn, or in the leet. *Ibid.*

Or, before the sheriff by commission; but this is now taken away by *st. 28 Ed. 3. c. 9. 2 Inst. 701. F. N. B. 127. E.*

[The sessions impose a general rate, and order the officers to make a particular assessment and collect it. *Rex v. Middlesex, H. 11 G. 2. Andr. 101.*]

[It is not necessary that the order for the assessment of the repair of a county bridge should set forth that it is presented by whom the bridge should be repaired; for the only matter necessary to be presented is, that it is a public bridge, and out of repair. *Rex v. Middlesex, H. 11 and M. 12 G. 2. Andr. 101. 285.*]

Or, there may be an information exhibited for not repairing. *2 Lev. 112.*

[Information in *B. R.* lies, notwithstanding the *stat. 22 H. 8. c. 5. and 1 Ann. 18. Rex v. Inhab. Civ. Norwici, P. 5 G. Str. 177.*]

If it is a private bridge to a mill, &c. he that has the passage may have a writ *de ponte reparando* against him who ought to repair it. *F. N. B. 127. D. 2 Inst. 791.*

To an information or indictment for not repairing, if the defendant pleads *Not Guilty*, he shall give nothing in evidence, but that the bridge is repaired. *Per Holt.*

If he pleads, *that another ought to repair*, he ought to shew for what cause; viz. *ratione tenuræ*, by prescription, &c. *Cro. Car. 366.*

And if he alleges, *that it is a new bridge erected for the benefit of a mill*, it is not sufficient to take by protestation that it is not an ancient bridge; for that is the substance, and ought to be directly answered. *R. Cro. Car. 365.*

If the defendant alleges, *that A. ought to repair*, &c. *absque hoc* that the county ought, the attorney-general may reply, *that the county ought*, *absque hoc* that A. ought, and tender issue upon it. *2 Lev. 112.*

(B 4.) *By statute law.*] By the *st. 22 H. 8. c. 5.* confirmed by the *st. 1 Ann. 18.* Justices of peace of a county, franchise, &c. or four of them (one *quorum*) shall have power at quarter-sessions to hear and determine all annoyances of bridges broken in highways.

And

And to make such process and pains, on presentment before them, against those, who ought to be charged with making or amending such bridges, as *B. R.* uses to do, or as they shall deem necessary.

And if not known who should repair, &c. the bridge, or such part as lies in a town corporate, shall be repaired by the town; if out of the corporation, by the county; and four justices of peace (one *quorum*) may summon the constables, or two inhabitants of every parish, and tax all the inhabitants for the repair, &c. and deliver a roll of the names and sums to the collectors of each hundred, who may levy by distress and sale, &c.

And four justices of peace (one *quorum*) may appoint two surveyors to see the repairs, to whom the collectors shall pay the money, and they shall all account to the justices of the peace, or four (one *quorum*) at the sessions, and on refusal be committed without bail till they do so, allowing reasonable charges.

And if the person, who ought to repair, &c. dwell in another county, the justices of peace may send the same process, as if in the same county, which all sheriffs, &c. shall execute.

And four justices of peace (one *quorum*) may use the same methods for repair of 300 feet at each end of bridges when out of repair, as for repair of the bridges.

By the *st. 1 Ann. 18.* Justices at the quarter-sessions shall lay such sum on each parish as it hath usually been assessed at, which shall be levied by the constable or other persons as the justices shall direct, and by them in six days paid to the high constables, and by them in ten days to the treasurer, for repair of the bridges.

Such assessment to be levied by distress and sale, on non-payment in ten days after demand.

By the *st. 22 H. 8. 5.* Justices of peace have no authority, except of public bridges, not of private. 2 *Inst. 701.*

Justices of peace of the county have no cognizance of the repair of bridges within a franchise, borough, or city, if there are four justices there (one *quorum*). 2 *Inst. 702.*

But if there are not so many justices of peace in the franchise, then the justices of the county shall inquire of the bridges there, if the franchise be not a county by itself. *Ibid.*

And if it be a county by itself, then no remedy but by common law. *Ibid.*

Justices of peace shall have jurisdiction of a common bridge in a common street, as a nuisance, though it be not in an highway. 1 *Sal. 359.*

If it be known who ought to repair any bridge, by the *st. 22 H. 8. 5.* the justices of peace shall issue the same process as the justices of *B. R.* 2 *Inst. 702.*

And so, for rebuilding, if necessary, as well as repairing. *Ibid.*

If it be not known who ought to repair, it is well, for the security of the justices of peace, that the grand inquest present the bridge in decay, &c. & *quod nescitur qui*, &c. 2 *Inst. 703.*

If it be not known who ought to repair, it shall be at the charge of the county, &c. 1 *Roll. 368. l. 10. Vide ante, (B 2.)*

And this act of 22 *H. 8. 5.* ought to be executed by four justices (one *quorum*) or more. 2 *Inst. 703.*

And it is good to do it by more, otherwise if one dies, or is put out

out of the commission, the three others have no other authority to proceed. 2 *Inst.* 703.

It is safe, that all proceedings of the justices of peace upon this statute be at the general sessions of the peace. 2 *Inst.* 705.

The justices of peace cannot tax, without assent of the constables or inhabitants. 2 *Inst.* 704.

And therefore, they ought at the general sessions, where the constables are present, to call them, or by warrant summon them, or two inhabitants, at a certain place and time for that purpose. 2 *Inst.* 703. *in marg.*

The tax shall not be imposed upon the parish, in general, for then any inhabitant might be distrained for the whole, but upon each inhabitant by himself. 2 *Inst.* 704.

And here all privileges and exemptions, tho' by parliament, are taken away. *Ibid.*

Every householder is an inhabitant, but not a servant, &c. tho' he has a personal residence. 2 *Inst.* 703.

Every one who has an house and servants there, tho' he resides in another county. *Ibid.*

So, a man dwelling in another county, who occupies land there. 2 *Inst.* 702.

So, a corporation, which occupies land in another county, is an inhabitant there. 2 *Inst.* 703.

So, an infant, who has an house, or holds land there. *Ibid.*

So, a man, who holds land there in right of his wife. *Ibid.*

The collector of every hundred shall have a roll indented, under the seal of four justices of peace. 2 *Inst.* 704.

The collector may distrain for the tax, upon the land or goods of the party, at any place within the hundred. 2 *Inst.* 705.

If the tax be not paid upon demand, it is a refusal, tho' it was not expressly denied. *Ibid.*

One of the collectors, with the assent of the other, may distrain and sell; for that is the distress of both. *Ibid.*

The surplussage upon a sale shall be returned to the owner. *Ibid.*

None can be compelled to make a new bridge, where there was not any before, except by act of parliament. 2 *Inst.* 701.

[By 12 G. 2. c. 29. §. 13. no part of the county rate shall be applied to repair bridges, but on presentment of the grand jury.]

[And by §. 14. the quarter sessions may contract for their repairs for seven years, at an annual sum.]

[By stat. 14 G. 2. c. 33. quarter sessions may purchase lands to build county bridges, not exceeding one acre for each bridge.]

[Those who are bound to repair a bridge are bound to widen it, if the exigencies of the public make it necessary. *Rex v. Cumberland*, H. 35 Geo. 3. 6 T. R. 194.]

(C) Surveyors for the Highway.

(C 1.) How chosen.

BY the §. 2 & 3 Ph. & M. 8. On Tuesday or Wednesday in Easter week, and by the §. 22 Car. 2. 12. on some day in Christmas week, and by the §. 3 & 4 (or 3) W. & M. 12. on 26th December, unless it be Sunday, and then the 27th, The constables, church-

churchwardens, &c. shall chuse two surveyors for a year to amend the highways leading to market towns, who refusing shall pay 20 s. a-piece.

By the *stat.* 3 & 4 (or 3) *W. & M.* 12. The parish shall assemble and make a list of such inhabitants, who have 10 *l.* *per annum* in their own or their wife's right, 100 *l.* personal estate, or farm 30 *l.* *per annum*, or if no such, of the most sufficient, and return the list to the justices of peace at special sessions, 3d *January*, or, if *Sunday*, the 4th, or in fifteen days after, of which ten days notice shall be given to the parish; and the justices shall by warrant under hand and seal appoint one, two, or more out of such list to be surveyors for next year; which nomination shall in six days be notified to the persons chosen, by the constable or surveyor, by leaving the warrant or a copy at their place of abode. And if any refuse the office, they shall forfeit 5 *l.* each, a moiety to the informer, a moiety to the repair of the highway, to be levied, on the oath of one witness, by warrant of two justices of peace by distress and sale, &c. And then the justices shall nominate another fit person, who on notice, &c. refusing, forfeits 5 *l.* &c. And the constables, churchwardens, and surveyors not returning a list forfeit 20 s. each, to be levied, &c.

[By *stat.* 13 *G. 3. c.* 78. On 22d *September* the constables and householders assessed to public rates shall name ten inhabitants, who have each 10 *l.* a-year lands, or 100 *l.* personal, or occupy lands of 30 *l.* a year; or for want of such, the most sufficient inhabitants; and in three days the constable shall transmit a copy to a justice near the place, and shall deliver the original to the special sessions for the highways, next after *Michaelmas* quarter session, and shall in three days give personal notice, or leave notice in writing to the persons named. Justices to give ten days notice of their special sessions, and to name what surveyors they think fit from the lists, if they think them qualified; if not, from other substantial inhabitants or occupiers of lands living within three miles of the place, in the county. Constables to give persons appointed notice, by serving the warrant in three days. If he accepts, he is surveyor for the year ensuing. Justices to give them a charge. Person named in the list, not accepting, if appointed, in six days, forfeits 5 *l.* Person not in the list, but appointed, not accepting, forfeits 50 s. No person serving can be again appointed (without consent) in three years from such appointment and service.]

[If no list returned, or if the persons appointed refuse, the justices shall at that or a subsequent sessions, in a month, appoint another person to be surveyor, with salary out of forfeitures, not exceeding one-eighth of a sixpenny assessment.]

[If constable does not make list, and return it and the duplicate, and give the notices, and serve the warrants, and return the amount of the assessment, if required, he forfeits 40 s. for every default.]

[*stat.* 2. If surveyor with salary is appointed, a substantial inhabitant shall be appointed his assistant; if he refuses to accept, he forfeits 50 s.; and so another, under like forfeiture; and then a third, who shall have those two forfeitures, and further salary, if necessary. Assistant serving, cannot be appointed assistant in three years from his first appointment, without consent.]

[*stat.* 3. Surveyor with salary, not residing in the place, shall give
bond

bond to account; and so by *stat. 13 G. 3. c. 84. §. 65.* shall treasurer and surveyor of turnpike.]

[*§. 4.* Assistant is to assist in calling in and attending the statute-duty, in collecting compositions, &c. and assessments, making and serving notices, to account for money received to surveyor, or in default forfeits double value; and for every wilful neglect of duty, forfeits from 5 *l.* to 40 *s.* shall pay sums above 40 *s.* on surveyor's order in writing. Surveyor not responsible for money not received by him, or paid by his order.]

[*§. 5.* Two-thirds of the parish-meeting may agree with a person of skill to be surveyor, with a salary, and return his name, with the list, to the justices; who may, if they think proper, appoint him, and allow him the salary agreed on, to be raised as the former.]

[If surveyor dies, or becomes incapable, the justices may appoint another, and allow him the salary.]

[*§. 55.* Justices of corporations shall not allow salary to surveyor appointed by them, unless approved by two-thirds of town-meeting.]

[*§. 71.* Justices shall give every surveyor appointed an abstract of this act, and the clerk to have 6*d.* for it.]

[*§. 86, 87, 88.* This act extends not to *Bristol, Whitechapel, or Wapping*, nor to the commissioners of sewers.]

[The magistrates are not bound to appoint surveyors from the list of persons returned to them under this statute, if in their opinion the persons are not qualified; but they may appoint other persons of the parish who are qualified. *Rex v. Baldwin, H. 37 Geo. 3. 7 T. R. 169*]

[By *stat. 13 G. 3. c. 84. §. 44.* Turnpike trustees shall swear themselves worth 40*l. per annum* in lands, &c. or 800*l.* personal estate, or heir apparent to a person worth 80*l. per annum*, or forfeit 50*l.*]

[*§. 46.* Keeper of public house shall not be a trustee or officer of turnpike; but he may farm the toll, if he employs a collector not incapacitated.]

[*§. 49, 50.* If a sufficient number of trustees do not appear at any meeting, the clerk may fix and give ten days notice of another. And no meeting shall be adjourned for more than three months; no business done before ten in the morning, nor adjournment made to any hour after two in the afternoon.]

(C 2.) Their Authority and Power.

(C 2.) *To provide labourers.*] By the *stat. 2 & 3 Ph. & M. 8.* Every person for every plowland in pasture or tillage he occupies in the same parish, and every one keeping a draught, or plough, shall send a cart with horses, &c. and all necessaries, and two able men with the same, at every day and place appointed for amendment of the highways, on pain of 10 *s.* for every draught: And every other householder, and every cottager or labourer shall (unless he be a yearly hired servant) by himself or sufficient labourer, work every day, &c. on pain of 12 *d. per diem*; but if a carriage is thought needless by the surveyor, every person shall send two labourers each day for every carriage, on pain of 12 *d. per man.* And the leet, or in default, the justices of peace at the quarter sessions may fine all offences, and the clerk of the peace, &c. shall make estreats indented of the fines, and deliver one part to the

the constable and churchwardens of the parish, the other to the high constable, &c. who may levy by distress, and if no distress, or he pay not in twenty days, he shall pay double. And the high constable shall yearly account to the constable and churchwardens of the parish on pain of 40 s. and the constable and churchwardens may call him, or their predecessor, to account before two justices of peace (one *quorum*), who may commit, till all arrears paid, but shall allow 8 d. *per pound* for the collection, and 12 d. *per pound* to the clerk of the peace, or steward of the leet, and all fines shall go to the repair of the highway.

By the *st.* 18 *El.* 10. A person (not in *London*) rated to the subsidy 5 l. in goods, or 40 s. in lands, shall find two labourers in the highway while so rated, if not otherwise chargeable by any former law, but as a cottager.

And a person, having a plowland of tillage, or pasture in several parishes, shall find a cart, &c. in the parish where he dwells, as if all in the same parish; but if several plowlands in several parishes, he shall find for each, as if in the parish where he dwells.

By the *st.* 22 *Car.* 2. 12. Where the usage is to carry gravel, &c. on horses, &c. the inhabitants shall send in such horses, &c. instead of teams; and for default of working in the highway, every labourer shall forfeit 18 d., every horse and man 3 s., every cart and two men 10 s. for every day, for repair of the highway, to be levied, on proof before the next justices of peace by one witness, by distress and sale, &c.

[But they may also be indicted, for this was an indictable offence before this statute. *Vid.* 2 *Bur.* 832. 834.]

By the *st.* 7 & 8 *W.* 3. 29. A person having 50 l. *per annum* in woodland, or any other land, shall be deemed to have a plowland within the said acts.

The justices of peace, &c. ought to appoint particular days for working in the highway; for it is not sufficient to say, *six days between such a time and such a time.* *R.* 1 *Sal.* 357.

So, an indictment for not working ought to shew the particular days appointed. *Ibid.*

But if particular days are not appointed for working in the highway, a parishioner is not bound to work there. *Ibid.*

[By *stat.* 13 *G.* 3. c. 78. *st.* 34. Every person keeping a waggon, &c. and three horses used to draw it, shall send a cart and two men six days in the year for his statute duty, in the parish where he resides, for lands not exceeding 50 l. *per annum*. If he occupies in the same parish 50 l. beyond that 50 l. or occupies 50 l. in another parish, or does not keep a team, but occupies 50 l. in any parish, he shall in like manner send a cart and three horses, or four oxen and one horse, or two oxen and two horses, and two men; and so for every 50 l. which he shall further occupy in any such parish; such carts, &c. to be employed in repairing the roads in the parish where the lands lie. And every person who shall not keep a team, but occupy lands under 50 l. in the parish where he resides, or any other; and every person keeping a team, and occupying lands under 50 l. in another parish, shall pay, for every 20 s. annual value, a penny a day, and so for every 20 s. above 50 l. and under 100 l. and so between every fifty: and on non-

payment, to be levied by distress. Person occupying under 30*l.* shall send but one labourer with his team.]

[§. 35. Persons keeping a cart, and only one or two horses used to draw, shall send such cart and horses, and one labourer, or pay composition, as surveyor chuses. Persons keeping coach, &c. but no team, nor occupying 50*l. per annum*, shall pay 1*s. per day per horse*, or pay composition, as surveyor chuses; and every man between eighteen and sixty, not chargeable for 4*l. per annum*, nor being apprentice or menial servant, shall labour six days. Surveyor may require three labourers instead of a team, or to be paid 4*s. 6 d. per day*. They are to work eight hours a day. If the men sent are not sufficient, or if any refuse to work, surveyor may dismiss them, and recover the penalty for not sending.]

[§. 36. Surveyor may require part of a team; one horse and a stand-cart is one-third, two horses two-thirds. He may require a waggon.]

[§. 37. He is to give or leave in writing four days notice of the day, hour and place for every day. Defaulters to forfeit, for a cart 10*s.*, cart and two horses 5*s.*, cart and one horse 3*s.*, labourer 1*s. 6 d.* duty, if not all necessary, to be equally required. Surveyor to recover penalties with all speed.]

[§. 38. Persons may compound for duty, as justices shall settle, between 6*s.* and 3*s.* for a team, if no appointment, 4*s. 6 d.* for a team, cart and one horse 2*s.*, cart and two horses 3*s.*, labourer 4*d.*]

[§. 39. If extravagant prices are likely to be asked, justices may order team-duty in kind, except teams of persons occupying under 20*l. per annum*; and labourers paying them the usual wages, abating 4*d.* If only part required, to be balloted for.]

[§. 40. Person who keeps a team, but does not occupy 30*l. per annum* in the parish where he lives, but partly maintains his horses from lands he occupies in other parishes, two justices may mitigate his duty.]

[§. 41. Surveyor on a Sunday in November to give ten days notice in church, and to repeat it next Sunday, of the time and place, of signifying intention to compound; and those who so signify, and pay composition then, or in a month, are discharged of duty. No composition admitted, unless paid within time aforesaid, unless on change of occupier or inhabitant, who may compound within fourteen days. Person going away in six months may compound for half. Surveyor receiving too much shall refund, to bring all to equality.]

[§. 42. Persons keeping a draught or plow, but no carriage, shall pay 1*s. per horse*, or two oxen.]

[§. 43. Inhabitants may fix three months for seed, hay, and corn-harvest, wherein no duty shall be done, giving notice to overseer three days after meeting, and fourteen before the beginning of each month.]

[§. 44. Surveyor shall pay the proportion of composition for turnpike-roads to the treasurer or surveyor, to be laid out on the turnpike in that parish.]

[By Stat. 13 Geo. 3. c. 84. §. 32. Turnpike-surveyor shall make the statute duty to be done, and shall lay out the composition-money in the parish whence it arises; and on misapplication forfeits 40*s.*

Where

Where there are two turnpike-roads in one parish, and the statute-duty for both exceeds three days, justices in special session shall apportion it.]

[§. 58. Justices at special sessions may order the statute-duty appointed for the turnpike-road to be performed on the other roads, if their respective condition permits and requires it; and the money lent on turnpike is not thereby endangered.]

(C 3.) *For what time.*] By the *st.* 2 & 3 *Ph. & M.* 8. Constable and churchwardens, at the election of surveyors, shall appoint four days before *midsummer* (and by the *st.* 5 *El.* 13. six days) for amendment of the highways, and give notice of the days in the church the *Sunday* after *Easter*: And every carriage and labourer shall work eight hours every day, unless licensed by one of the surveyors.

By the *st.* 22 *Car.* 2. 12. It is sufficient, if the highways be amended before *St. Luke's day*, though not before *midsummer*.

Surveyors shall appoint six days for work in the highway, with regard to the season of the year and weather, and giving notice publicly some convenient time before the several days.

By the *st.* 1 *Geo.* 52. Justices of peace at their special sessions may order great roads to be first amended, and at what time, and in what manner to be done, to which the surveyors are to conform.

And surveyors shall summon teams and labourers to come in at the first seasonable days the year shall afford, and shall repair such as the justices, or, in their default, as they think needful in the first place.

(C 4.) *To provide materials.*] By the *st.* 5 *El.* 13. Surveyors may take rubbish in any quarry of a parish, if ready digged, and if no such may dig in the several ground of a parishioner (not his house, garden, orchard, or meadow) for gravel, sand, or cinders for highway, without licence, so as he dig but one pit, not above ten yards over, and in a month after fill it up, at the charge of the parish on pain of five marks for every default to the owner by action of debt, &c.

[Justices cannot make an order to dig over all an estate, and leave it to the discretion of the surveyor where; they must fix on the particular part. *Rex v. Manning*, T. 30 & 31 G. 2. 1 B. M. 377.]

[They must award satisfaction to the owner, as well as the occupier. *Ibid.*

[They must specify what kind of materials cannot be found in the waste grounds: for they cannot dig in private grounds [for all kinds of materials, merely] because some kind of materials are not to be found in wastes, if other proper may. *Ibid.*]

[They cannot try for materials in private soil; they should previously know, or have reasonable prospect of finding them. *Ibid.*]

[By *stat.* 13 G. 3. c. 78. §. 27, 28. and 13 G. 3. c. 84. §. 61. Surveyor may take refuse stones of any quarry in his own parish without owner's consent, but not to dig; and he may in any common ground or river, in his own parish, (or any other, leaving sufficient for themselves,) get gravel, &c. or gather stones in his parish, without satisfaction, but satisfaction for damage done; owner's consent must be had to gather stones, or license from a justice. This extends not to stones thrown up by the sea, called beach.]

[*Cap. 78. ff. 79.* If sufficient materials cannot be had in common grounds, surveyor may search in inclosed grounds in his own parish, or by license from two justices in special session in other parishes, and to take what he thinks necessary, making satisfaction; if they cannot agree, to be settled by one justice. Clay may be got where any other materials may, and may be burnt on any common ground. Materials must not be taken, if owner gives notice he shall want them to repair roads, without an order of two justices, after hearing.]

[*ff. 31.* Surveyor shall fence in holes made in getting materials, whilst open; if no materials found, to fill it up, and cover it with turf, in three days; if materials found in fourteen days after digging enough, to fence, slope, or fill up; in twenty days after appointment, to fill up or slope all holes not likely to be used; if likely to be used, to fence them with posts and rails, on pain of 10s. for every default; and if he neglects it for six days after notice from a justice, the owner, or a commoner, to forfeit from 10l. to 40s. for every neglect.]

[*ff. 32.* Materials for another parish must be carried between 1st April and 1st November, or in hard frost.]

[*ff. 33.* Persons digging materials, whereby bridge, mill, building, dam, highway, ford, mines, or tin-works, may be endangered, forfeit from 5l. to 20s.]

[*ff. 50.* If sufficient materials cannot be got by statute-duty, surveyor may contract for the same, at a meeting to be held on ten days notice. Surveyor not to be concerned in contract, without licence from a justice, under penalty of 10l. and incapacity to be surveyor.]

[*By stat. 13 G. 3. c. 84. ff. 36.* Turnpike-surveyor may contract for materials; to have no share in the contract without licence, on pain of 10l. and incapacity.]

[*ff. 70, 71.* He may, with the approbation of trustees, apply the tolls and statute-duty in the execution of the powers in the highway acts, for providing materials, enlarging, turning, stopping up and selling roads, making drains, cutting trees and hedges, and calling out the labourers (for the proportion of labour) as the parish surveyors may, making the same satisfaction for materials and damages as they ought to make.]

(C 5.) *To remove obstructions. Water-course.* By the *st. 5 El. 13.* Surveyors may turn a water-course out of the highway into any ditch of another's several ground adjoining to the highway, as they think meet.

By the *st. 18 El. 10.* If a bank be between the highway and ditch, the surveyors, &c. may make sluices through the bank to let the water out of the highway into the ditch.

By the *st. 1 Geo. 52.* If any, who ought to scour ditches or water-courses near an highway, neglect for thirty days after notice by the surveyors, or leave the earth eight days after scouring, he shall forfeit 2s. 6d. for every eight yards of ditch not scoured, on the oath of the surveyor before justices at the quarter-sessions, and for other offence, a sum not exceeding 5l. nor under 20s. to be levied by distress and sale, &c.

[*By stat. 13 G. 3. c. 78. ff. 8.* Occupiers of lands shall make and scour sufficient ditches, drains, and water-courses, and lay bridges at cartways,

cartways, &c. and occupiers of land where the waters used to pass, shall scour, &c. on pain of 10 s. on ten days notice.]

[§. 12. The surveyor is to view all highways, and if any nuisance, to give personal notice, or leave notice in writing at the place of abode, and if not removed, ditches cleaned, bridges made or mended, hedges pruned, (*trees* are not mentioned in this §.) in twenty days, he is to do it; and the person neglecting, forfeits 1 d. per foot of the ditch not cleaned or hedges pruned, besides the charges; and on non payment, to apply to a justice, who on proof of notice as aforesaid, and of the work done by surveyor, and the charge, he shall be repaid on demand; or in default, it shall be levied as other penalties in the act.]

[§. 14. Where the ditches, &c. are insufficient, new ones may be made by surveyor, by order of one justice, through *any* lands, making bridges, for convenient enjoyment of the lands, and satisfaction for the damage, to be settled as getting materials.]

(C 6.) *Trees, hedges, &c.*] By the §. 5 *El.* 13. ditches, fences, &c. shall be scoured, repaired, and kept low, and trees and bushes growing in an highway shall be cut down by the owner of the ground, that the way may be open:—And by the §. 18 *El.* 10. upon pain of 10 s. for every default.

And by the §. 18 *El.* 10. The occupier of ground adjoining to the grounds next an highway, shall scour his ditches when needful, that the water from the highway may have passage over the grounds next adjoining, on pain of 12 d. per rood not scoured.

And none, in scouring a ditch, shall throw the soil into the highway leading to a market town, and let it lie there six months, on pain of 12 d. per load.

By the §. 3 & 4 (or 3) *W. & M.* 12. The owners or occupiers of land shall scour ditches, drains, &c. next an highway, carry away the earth taken thence, lay sufficient trunks, bridges, &c. where cartways are into their grounds, in ten days after notice from the surveyor, on pain of 5 s. to be levied by distress and sale, on proof by one witness before two justices of the peace, a moiety to the informer, a moiety to the repair of the highway.

And shall cut down, &c. any tree, bush, &c. in an highway, not twenty feet broad, in ten days after notice by the surveyor, on pain of 5 s. to be levied, &c. And shall keep their hedges pruned right up from the roots, and not permit trees to hang over the highway, &c.

And the surveyors after view, &c. shall give notice the next *Sunday* in the church, and if not removed in thirty days, shall in thirty days remove, &c.

And the surveyors, if need is, may make new ditches, &c. in the lands next to an highway, and keep them cleansed, and enter the land for that purpose.

[By *stat.* 13 *G.* 3. c. 78. §. 6. No tree or shrub to stand in a highway, within fifteen feet of the centre, on pain of 10 s. after ten days notice, except for ornament, or shelter of the house, building, or court-yard of the owner.]

[§. 7. Possessors of land next adjoining shall cut their hedges, and cut down or lop trees growing in or near their fences, that sun and wind be not excluded (except trees for ornament); if not, on ten

days notice from a surveyor, he is to complain to a justice, who shall summon possessor to appear at a petty sessions, who shall order them to be cut in such manner as may best answer the purposes; if not done on ten days notice, he forfeits 2*s.* for every twenty-four feet of hedge, and 2*s.* for every tree; and the surveyor is to do it, and possessor to pay for it, besides the penalties, to be levied by warrant of one justice.]

[§. 13. Hedges to be pruned only from the last of *September* to the last of *March*. None are obliged to sell timber-trees in hedges, unless when the road is ordered to be enlarged; or to cut oaks in the highway, but in *April*, *May*, or *June*, and other trees in *December*, *January*, *February*, or *March*.]

(C 7.) *Rubbish, dung, &c.*] By the *st.* 3 & 4 (or 3) *W. & M.* 12. None shall lay, in an highway, not twenty feet broad, any stone, timber, straw, dung, &c. by which it shall be annoyed, on pain of 5*s.* to be levied by distress and sale, on proof by one witness before two justices of peace, a moiety to informer, a moiety to repair of the highways: And the owners or occupiers of lands next the highway shall, in ten days after notice by the surveyor, remove such nuisances, and take them to their own use, on pain of 5*s.* to be levied, &c. And the surveyors the next *Sunday* after view of any annoyances, &c. shall give notice in the church after sermon, and if not removed in thirty days after, shall in thirty days remove them, and dispose of them for the repair of the highways, and be reimbursed their charges as any justice of peace shall think fit to allow, on oath of such notice, &c. to be levied, &c.

By the *st.* 7 & 8 *W.* 3. 29. If any be convicted by the oath of one witness, or view of a justice of peace of an offence in pulling down, &c. any post, stone, or bank, &c. for securing any horse or foot causeway, he forfeits 20*s.* a moiety to the discoverer, and a moiety for repair of the highway, to be levied, &c.

[By *stat.* 13 *G.* 3. c. 78. §. 9. Whoever lays stone, timber, straw, &c. in highway, or leaves the earth of ditches, so as to obstruct, five days after notice, for every offence forfeits 10*s.*]

[And by §. 10. If it is within fifteen feet of the centre, and not removed in five days notice from the surveyor, or any person aggrieved, any person may take it for his own use.]

[§. 11. Whoever sets waggon, cart, carriage, plow, or instrument of husbandry, in highway (except to unload) so as to obstruct, forfeits for every offence 10*s.*]

[§. 63. Collector of tolls on a bridge shall not keep alehouse, on penalty of 5*l.*]

[§. 64. Person making fence on highway not turnpike, within fifteen feet of centre, or breaking up soil, or turning plow or harrow within fifteen feet where the road is formed, and the breadth marked with certainty, and is not above thirty feet, forfeits 40*s.* to informer; and surveyor may take down the fence at offender's expence, and one justice may levy forfeiture and expences by distress.]

[By *stat.* 13 *G.* 3. c. 84. §. 37. Turnpike surveyor suffering rubbish, &c. to lie within ten feet of the middle of the road for four days, forfeits 40*s.*]

[§. 38. Person making fence within thirty feet, or breaking soil, or

or turning plow or harrow within fifteen feet of centre of turnpike-road, forfeits 40*s.* to the informer; and five trustees may take down the fence at offender's expence, and one justice may levy the expences and forfeiture on oath, by distress.]

(C 8.) *To enlarge highways.*] By the *st. Wint.* 13 *Ed.* 1. 5. Highways from market to market shall be enlarged, and no bushes, &c. on 200 feet on one side or other.

By the *st.* 3 & 4 (or 3) *W. & M.* 12. Surveyors shall make the highway to a market town eight feet wide at least, and as near as may be, even and level: And no horse causeway shall be left less than three feet wide.

By the *st.* 8 & 9 *W.* 3. 16. Justices of peace at the quarter sessions, being five at least, may enlarge any highway, not taking in above eight yards, so as not to pull down an house, or take the ground of a garden, orchard, court, or yard: And may impanel a jury to assess on oath the damage to the owner, &c. of the ground taken in, not above twenty five years purchase, and for making a new ditch, &c. on payment whereof to the owner, or leaving it with the clerk of the peace, the said ground shall be the public highway.

But the justices of peace shall first summon the owner to appear at the next quarter sessions, and the owner may cut down within eight months all timber, &c. on the ground so taken in, or, in his default, the justices may order the felling, and account for the same.

And the owner may appeal to the judge at the next assizes, who may affirm, or reverse and give costs, to be levied by distress and sale, &c.

And the justices of peace may make a rate not exceeding 6*d.* per pound to pay the purchase, to be levied, on non-payment in ten days after demand, by distress and sale, &c.

And after an inquisition for inclosing part of an highway, on an *ad quod damnum*, any may appeal to the next quarter-sessions, whose determination, or the filing and recording the return of inquisition by the clerk of the peace, if no appeal shall be final.

By the same *st.* 8 & 9 *W.* 3. 16. Justices of peace at the special sessions may order surveyors to erect posts, &c. at cross ways, who neglecting for three months, forfeit 10*s.* to be levied by distress and sale, or warrant of any justice of peace, for erecting such post, &c.

[By *stat.* 13 *G.* 3. *c.* 78. *st.* 15. Every public cart-way leading to a market town, shall be twenty feet wide at least, and every public horse-way or draft-way of eight feet at least.]

[*st.* 16, 17, 18. Two justices may order roads to be widened, or diverted and turned, but not to exceed thirty feet in breadth, nor to pull down building, nor take ground of garden, park, paddock, court, or yard; satisfaction to be made by surveyor under the direction of the two justices taking the view; if they cannot agree, the two justices to certify to the quarter-sessions, and on proof of fourteen days notice, they shall impanel a jury, who shall settle it, but not above forty years purchase; and on payment or tender, or leaving it with the clerk of the peace, if the owner cannot be found, or refuses to accept, it shall be deemed a highway. Money may be raised by assessment by order of quarter sessions, not exceeding 6*d.* in the pound in one year; the old road to be stopped up, and the land sold by the surveyor, subject

to right of passage to any house, &c. which cannot be accommodated by the new; but mines and minerals are reserved to the former owner. The costs shall be borne by surveyor, if the verdict is for more money than he offered; if for less by the party refusing to accept it.]

[This extends to roads *ratione tenura*; and on disobedience to the order of the justices, the party may either be proceeded against summarily by the statute, or by indictment. *Corwp.* 648.]

[§. 19. Two justices may turn a road with consent under hand and seal of the owner of the new one; persons aggrieved may appeal from this, or from inquisition on *ad quod damnum*, to quarter sessions, who shall finally determine; old road not to be stopt till new one finished; where a road has been turned above twelve months, and no suit or prosecution, the new one shall be deemed the road; persons liable to repair the old road are liable to repair the new; and so by *stat.* 13 *Geo.* 3. c. 84. §. 63. as to turnpike roads turned.]

[This section of the statute has only a *retrospective* view, and refers alone to those roads which had been diverted at the time of passing the act. *Waite v. Smith*, B. R. H. 39 *Geo.* 3. 8 T. R. 133.]

[The *stat.* 34 *Geo.* 3. c. 74. §. 7. continues the provisions of this act, excepting in the instances specifically mentioned.]

[§. 20. Common land lying between the fences of the old road shall not be inclosed; if not common land, and it exceeds thirty feet, and is under fifty feet in breadth, satisfaction shall be made to the owner for what it exceeds thirty feet; if it exceeds fifty feet, or lies thro' the open field of another, the owner of such adjoining land shall have the land of the old highway, paying the surveyor for thirty feet.]

[§. 21. Foot ways changed, the damage to be settled by two indifferent persons, or a third chosen by them.]

[§. 22. Where highways are diverted, justices may stop up unnecessary highways, and sell the soil.]

(C 9.) *To make rates.*] By the §. 3 & 4 (or 3) *W. & M.* 12. justices of peace at the special sessions, on oath of a sum expended for materials, &c. or two of them, may by warrant cause a rate to be made on the inhabitants, &c. pursuant to the poor's rate, to be levied by distress and sale, &c.

And justices of peace at the quarter sessions, being satisfied that the highways cannot be otherwise repaired, may order an assessment not exceeding 6d. *per pound* of real, and for 20l. of personal estate, on the inhabitants rateable to the poor, for repair, &c. which, on non-payment in ten days after demand, shall be levied by distress and sale, &c. And the justices of peace at any quarter-sessions may redress any person aggrieved.

By the §. 7 & 8 *W.* 3. 29. If a vill, &c. using to repair its own ways, after a rate of 6d. in the pound, cannot sufficiently repair them, the justices of peace at special sessions may order the whole parish to repair.

So, by the §. 1 *Geo.* 52. Justices at quarter-sessions may order an assessment, &c. before all the labourers, &c. have done their work.

[The order must shew, that the statute labour is not sufficient. *Rev v. Stroud*, T. 6 G. *Strange* 315.]

[It

[It must not be on the occupiers of land only, for others are equally liable. *Ibid.*]

[Order to make a rate on other parishes, because, that parish not sufficient, good; though it does not appear whether it was made before the six days work done or not. *Rex v. St. George, M. 12 G. Fort. 327.*]

[By *stat. 13 G. 3. c. 78. §. 16.* Two justices in case of agreement, or quarter-sessions, may grant 6*d.* assessment to pay for enlarging highways]

[*§. 30.* On application and oath of surveyor, of the sums expended or wanted for buying materials, direction posts, bridges, water-courses, and salaries, justices in special sessions may order assessment not exceeding 6*d.* in the pound.]

[*§. 45, 46.* Quarter or special sessions, if satisfied that highway cannot be amended by statute duty, may (on a week's notice at church) grant assessment for repairing them. But this assessment, with the former for buying materials, &c. shall not exceed 9*d.* in the pound. *Nota*; the assessment for enlarging not included.]

[*§. 48.* Surveyor's duty is to collect monies within the year, to keep books of the receipt and expenditure, for what, and to whom; of monies due; of tools, materials, &c. provided; and shall produce it, and the assessments made, at a parish meeting, within fifteen days before special session after *Michaelmas*; and carry them to a justice on a day to be then agreed on, before said special session, and verify it on oath, if required. Justice may allow account, or postpone it to special sessions, who may allow, on the articles objected to by the justice being verified by proper evidence, or disallow. Accounts allowed or disallowed to be transmitted to churchwarden or overseer, to be kept for the parish. Surveyor to deliver duplicate, and also all money, tools, &c. to new surveyor, who may recover all sums due, as the former. Surveyor not providing books, or not entering accounts or lists, or delivering them and duplicate, forfeits from 5*l.* to 40*s.* not paying or accounting for money remaining, forfeits double. Surveyor dying his executor must account, under the same penalties. Surveyor pays justices' clerks 1*s.* for appointment and charge, 6*d.* for bond, 1*s.* for account and oath. Whoever takes more forfeits 10*l.*]

[No appeal lies to the quarter sessions against the allowance of the surveyor's accounts. *Rex v. Yorkshire, E. 34 Geo. 3. 5 T. R. 629. Rex v. Mitchell, T. 34 Geo. 3. 5 T. R. 701.*]

[*§. 51.* Surveyor, for any neglect of duty not specified, forfeits from 5*l.* to 1*s.* at the discretion of justice or justices having jurisdiction.]

[*§. 68.* Assessment not paid ten days after demand may be levied by distress, by warrant of one justice; on default of distress, the party committed till assessment and costs paid.]

(C 10.) *To restrain carriages.* [*This is omitted in the st. 6 Anne 29.*] By the *st. 22 Car. 2. 12.* The owner of a waggon, &c. (if not employed for carrying hay, straw, corn [*unthreshed*], or about husbandry, or for coals, chalk, timber for shipping, materials for building, stones, ammunition for the king's service) travelling in the highway with above five horse beasts at length, unless by pairs, shall forfeit for every offence 40*s.* a third to the surveyor, a third to the poor, a third to the

the informer, to be levied by distress and sale, &c. on warrant to the high constable or other officer.

By the *§. 3 & 4 (or 3) W. & M. 12.* The justices of peace, at quarter sessions at *Easter* yearly, shall set the prices of land-carriage and certify them to the mayor, or other chief officer of every market town; and a carrier taking more forfeits to the party grieved *5l.* to be levied by two justices of peace, by distress and sale, &c.

By the *§. 7 & 8 W. 3. 29.* The owner of a waggon, &c. (not employed *ut supra* by the *§. 22 Car. 2. 12.*) drawn with more than eight horses, or eight oxen and an horse, or six oxen and two horses, or six horses and two oxen, or four oxen and four horses, which shall draw in pairs in double shafts, or a pole between as coaches, shall forfeit *40s.* only for every offence, two thirds for the highway, a third to the informer, to be levied by distress of one of the horses or oxen by the constable, surveyor, or overseer, and on non-payment in three days with charge, &c. by sale. And the penalty shall be levied by warrant of one justice, &c. and paid to the surveyor only, who shall account for it on oath at the special sessions, and pay it only to the parish where the offence was. And any person compounding with or taking of a waggoner, &c. any sum of money by way of reward, &c. for any offence against this statute, forfeits *40l.*, a moiety to him who sues, a moiety for the repair of the highway.

By the *§. 6 Ann. 29.* If above six horses or beasts in length forfeits *5l.*, a moiety to the surveyor, a moiety to the prosecutor, if an inhabitant, to be levied, &c.

By the *§. 9 Ann. 18.* Any person may seize any or all the horses or beasts of the offender, and deliver them to the parish officer, who on non-payment in three days, by warrant of one justice may sell, &c. *ut supra.*

By the *§. 5 Geo. 12.* The owner shall forfeit all horses, &c. in a waggon for hire above six, and in a cart, &c. above three.

[By *§. 13 G. 3. c. 78. §. 56, 57.*—

Waggons with 9 inch wheels to be drawn by 8 horses.

6 inch rolling 9 inches 7

6 rolling 6 - - 6

Less than 6 - - - 5

Carts with 9 inch wheels, to be drawn by 5

6 - - - 4

Less than 6 - - - 3

Carriages on 16 inch wheels or rollers, any number.

For every horse above the number, owner forfeits *5l.* driver not owner *10s.* to informer. Information before justice must be in three days, action in one month, and informer must give notice on the day the offence is committed of an intention to complain. If offender lives remote, justice may dismiss complaint, and leave informer to his remedy by action.]

[*§. 58. Michaelmas* quarter sessions may license an increased number of horses, up hills, or in roads not turnpike.]

[*§. 59.* Justices may stop proceedings, on oath of credible witnesses, that a carriage, by reason of snow or ice, could not be drawn by the number of horses allowed.]

[Number is not limited for one stone, rope, piece of metal or timber, or the king's artillery or ammunition.]

[Two oxen to be considered as one horse. So also by *§. 13 Geo. 3. c. 84. 67.*]

[By *§. 13 Geo. 3. c. 84.* Five trustees of turnpike may erect weighing-engine; and for weights exceeding the following, for the carriage and loading—

	Summer. Tons Cwt.	Winter. Tons Cwt.
Waggon, 16 inch rollers,	8 0	7 0
9 inch rolling 16	6 10	6 0
9 inch, - -	6 0	5 10
6 inch rolling 11,	5 10	5 0
6 inch, - -	4 5	3 15
Waggons less than 6 inch, - -	3 10	3 0
Cart 9 inch, - -	3 0	2 15
6 inch, - -	2 12	2 7
Less than 6, - -	1 10	1 7

From 1st *May* to last *October*, summer; the rest winter.

Cwt.	s.	d.	
For not above 2	0	3	} over-weight, { per cwt.
5	0	6	
10	2	6	
15	5	0	
above 15	20	0	

(This by *14 Geo. 3. c. 82.*)

[*§. 2.* Keeper of gate at engines to weigh all loaded carriages that he has reason to suspect, on penalty of 5*l.*]

[*§. 3, 4.* Trustee, creditor, clerk, treasurer, or surveyor, may oblige carriage to go back 300 yards to be weighed, tendering 1*s.* Turning places to be made within 300 yards of engine. List of such persons at each engine. Driver refusing to return, forfeits 40*s.* and any person may drive carriage back.]

[*§. 6.* These weights extend not to carriages employed in husbandry only, or carrying only manure, hay, straw, fodder, or corn unthreshed. Where lime or manure is allowed to pass toll-free, or for less toll, the carriage and loading may be weighed, and pay for over-weight. (And by *14 G. 3. c. 82.* they shall not be weighed.)]

[*§. 7.* Quarter sessions, on complaint of one justice, two creditors, or two trustees, may summon clerk, surveyor, and treasurer of turnpike, to shew cause next sessions why engine should not be erected, and order it to be erected; and trustees shall erect it forthwith, and treasurer pay for it out of the tolls.]

[*§. 8.* Where two turnpike roads meet, they may join for an engine.]

[*§. 9, 25.* No composition for carriages with wheels less than six inches broad, and unless the fellies and tire lie flat.]

[*§. 10.* Person unloading goods before they come to the engine, or loading after they have passed it from carriage or horse belonging to or borrowed by the carrier, to avoid the 20*s.* per hundred weight toll; or if he shall so unload, in order to carry considerable quantities of goods thro' the same day, and thereby pay less toll than if they had not been so unladen; on conviction before one justice, on oath of one witness, owner forfeits 5*l.*, driver, not owner, shall be committed to house of correction for one month.]

[*§. 11.* Driver turning out of road to avoid weighing, if owner, forfeits from 5*l.* to 20*s.*; not owner, 50*s.* to 10*s.*]

[*§. 13,*

[§. 13, 14, 15, 16. 18, 19, 20, 21.—

[Waggons with 9 inch wheels may	} And up hills 10 horses.
have 8 horses.]	
6	rising 4 inches 7
less 4	in a yard (with 5
carts 9 5	permission of 6
6 4	trustees and 5
less 3	quarter-sessions) 4]

[Carriages with 16 inch rollers, any number.]

[In deep snow and ice, any number.]

[On road where there is a weighing engine, any number.]

[Horses in 9 inch carriages to draw in pairs, except an odd horse, or not more than four; for every offence owner forfeits 5*l.* (driver, not owner, 20*s.*) to the informer. Prosecution before justice must be commenced in three days, action in one month, and notice given to the driver on the day of the offence. If offender lives remote, justice may dismiss complaint, and leave informer to his remedy by action.]

[Horses in carriages with wheels under nine inches shall not draw in pairs, except with six inch wheels authorised by turnpike-meeting, and carriages with two horses only. *Nota*; no penalty here mentioned.]

[Persons acting as driver with more horses, or with carriage not marked, may be carried before one justice, and forfeits from 5*l.* to 10*s.*]

[§. 59. Justices in *Wales* may augment the number of horses at *Michaelmas* quarter-sessions.]

[§. 17. Taking off horses, or altering distance of wheels before coming to gate, forfeits 5*l.* before justice; one witness.]

[§. 22. Trustees may mitigate high (prohibitive) tolls as to six inch wheeled carriages, so as not to take more than for waggons drawn by four, and carts drawn by three horses. (And by 14 G. 3. c. 82. within ten miles of *London* may mitigate these tolls for all carriages.)]

[§. 23. Trustees, &c. to take one half more than the tolls imposed, for narrow wheeled carriages, and after *Michaelmas* 1776, double toll.]

[§. 24, 25. No exemption from toll by virtue of former acts to be claimed, unless for six inch wheels, (except for carriages used in husbandry only,) and unless the felloes and tire lie flat.]

[§. 26. Carriages on sixteen inch rollers toll free for one year, and by 14 G. 3. c. 82. for five years, and then pay only half toll.]

[§. 27. Chaise marine, coach, landau, berlin, chariot, chaise, chair, calash, hearse, carriage with the king's ammunition or artillery, carriage with one horse or two oxen, and nine inch wheeled carriage, with one piece of stone, metal, timber, or rope not included.]

[§. 28. Persons taking advantage of any exemption fraudulently, shall forfeit from 5*l.* to 40*s.*]

[§. 29, 30. Trustees at a meeting on a month's notice may reduce tolls, with consent of five-sixths in value of the creditors; and advance the tolls again.]

[§. 31. Trustees on a month's notice may let the tolls to the best bidder; if he takes more or less tolls than directed, he forfeits 5*l.* and the contract: other gate-keeper forfeits 40*s.*]

[§. 34.

[§. 34. No side-gate shall be erected but by nine trustees, on twenty-one days notice; and no person shall pay at cross or side gate, unless he goes 100 yards on the turnpike road, or (by 14 G. 3. c. 57.) except specified in some former statute.]

[§. 35. Person subscribing to turnpike may be sued for non-payment.]

[§. 51. If trustees erect turnpikes contrary to their power, quarter-sessions may summarily determine, and order sheriff to remove them.]

[§. 52, 53. Mortgagee in possession of turnpike, shall account on oath, on fourteen days notice, on pain of 10 l. to be recovered before one justice, and applied to the roads; and if he keeps possession after he has received what is due, he forfeits double the surplus received, and treble costs.]

[§. 54. If gate-keeper dies, two trustees may appoint another till next meeting. Gate-keeper removed, refusing to deliver possession of house, &c. in two days, or the wife of one dead in four days, one justice may order constable to turn them out, and put the new one in possession.]

[§. 45, 55. Clerks, treasurers, &c. shall deliver up accounts and papers, on ten days notice from five trustees, or forfeit 20 l. and gate-keeper's account for money unaccounted for on pain of 5 l. to be recovered before one justice.]

[§. 56. Gate-keeper shall not be removed as a pauper, unless actually chargeable. No settlement gained by gate-keeper, or renting tolls and residence. Tolls and toll-house not rateable.]

[§. 57. Gate-keeper suffering carriage with too many horses, or without name, &c. and not informing in a week, forfeits 40 s.]

[§. 60. No toll to be paid for carriages solely employed in carrying materials to repair the highway.]

[§. 66. A table of tolls shall be put up at every turnpike, and trustees shall see that the weighing-engines are in order.]

[§. 69. From *Michaelmas* 1776, the tire shall be counter sunk, so that the nails shall not rise above the surface, which shall be quite flat.]

[*St.* 16 G. 3. c. 39. Repeals the clause in 13 G. 3. c. 84. relating to countersinking the nails; and enacts that six inch tire of wheels not deviating more than one inch from a flat surface shall be deemed flat.]

[The act 13 G. 3. c. 84. Except such parts as have been varied, altered or repealed, by any subsequent acts of parliament, and except so much thereof as gives an additional term of five years to acts for repairing particular turnpike roads, shall be taken to extend to all acts of parliament which have been made since the time of passing that act, and which shall hereafter be made, for amending and repairing any turnpike roads within *England*. *St.* 21 G. 3. c. 21.]

(C 11.) *To present offences.* By the §. 5 *El.* 13. The surveyor, within a month after an offence against the §. 2 & 3 *Ph. & M.* 8. or this act, shall present it to the next justice of the peace on pain of 40 s. who shall certify it to the next quarter-sessions, on pain of 5 l. where the justices of peace may enquire and fine for the same, as they think meet.—So by the §. 22 *Car.* 2. 12. within a month after any default, &c.

By

By the *st.* 22 *Car.* 2. 12. Surveyors and constables shall put all acts in force for the repair of the highway in execution, on pain of paying, if convicted of neglect before any justice of peace by one witness, or view of the justice, what the justice shall impose not exceeding 40*s.* to be levied by warrant, &c. to the high constable, &c. by distress and sale, &c. for repair of the highway.

By the *st.* 3 & 4 (or 3) *W. & M.* 12. Surveyors, in fourteen days after office accepted, and every four months after, shall view all roads, bridges, &c. in the parish to be repaired by the parish, and present on oath the condition he finds them in, on pain of 5*l.* unless he be excused by two justices of peace. And at the special sessions, &c. shall make presentment on oath, &c. and shall give account of what money received, and how disposed of, and the residue deliver to the next surveyors, on pain of double the value, to be levied, &c. And the surveyors, for every neglect against this act, shall forfeit 40*s.* to be levied, &c.

So, by the *st.* 1 *Geo.* 52. Surveyors shall view, &c. and give account in writing on oath of the defects of the highways, and of the neglects of labourers and of those who ought to find labourers or teams, &c. on the same pain as is for refusing the office.

[By *stat.* 13 *G.* 3. *c.* 78. *ff.* 60. and *stat.* 13 *G.* 3. *c.* 84. *ff.* 68. owner's name and abode shall be painted in large legible letters, on conspicuous part of waggon, &c. and on doors of coaches, &c. let to hire; and waggons, &c. travelling stages, shall have *common stage waggon*; and person using it without, or painting false inscription, forfeits 5*l.* to 20*s.*]

[*ff.* 61. and by *stat.* 13 *G.* 3. *c.* 84. *ff.* 40. Driver riding in his waggon, unless some other on foot or horseback to guide, or he has reins to conduct the horses, or who by negligence hurts any person, or goes on the other side the fence, or is so distant that he cannot direct, or by negligence interrupts the passage, or driver of empty waggon who refuses to make way for coach, &c. or loaded carriage; whoever drives a coach let for hire without name, or refuses to discover owner's name, forfeits on conviction before one justice, by confession, view or oath, 20*s.* if owner, 10*s.* if not; or commitment for one month, or till payment; and may be apprehended without warrant, to be carried before justice; if he refuses to discover his name, may be committed for three months, or proceeded against by description, without name.]

[*ff.* 62. Two justices may hold special sessions when they please, giving notice to the other justices in the limits.]

(C 12.) *Presentment upon view of a justice of peace.*] By the *st.* 5 *El.* 13. Any justice of peace on his own knowledge may, in the open general sessions, make presentment of an highway out of repair, or any offence against this act, or the *st.* 2 & 3 *Ph. & M.* 8. which shall have the effect of a presentment by twelve men; and the justices of peace at the same sessions may fine, &c. saving to the party his traverse. *Vide* 2 *Sand.* 157. *Keel.* g. 34.

[The presentment of a justice may be traversed generally. *Rex v. Justices of Wilts.* T. 4 *G.* 3. 3 *B. M.* 1530. 1 *Bl. Rep.* 467.]

If the party traverses, he admits it to be an highway, and that it ought to be repaired, as well as upon an indictment. *R.* 4 *Mod.* 38. *Sho.* 270.

So,

So, he cannot traverse the want of repair, for that is determined by the justices. *R. Keel. g. 34.*

And if the jury find upon the traverse, *that the highway wants repairing, but that it is not an highway*, the last words shall be rejected. *R. 4 Mod. 38.*

And therefore, if the inhabitants presented ought not to repair, they should plead *reparare non debent*. *4 Mod. 38.*

[By *§. 13 G. 3. c. 78. §. 24.* Justices of assize, of counties palatine, and of grand sessions of *Wales*, on view, and justice of peace, on view or information on oath of surveyor, may present highway, causeway, or bridge, not in repair, or any offence against this act. Traverse saved. Offenders may be fined. Quarter sessions may order prosecution at expence of the limit.]

[*§. 25.* Justices in special sessions may order what road shall be first repaired, and how.]

[*§. 26.* They may order direction posts where several roads meet, and graduated and direction-posts at waters; and so by *§. 13 G. 3. c. 84. §. 41.* may the trustees on turnpike-roads; and also order mile-stones; and if surveyor neglects to erect or repair for three months, he forfeits 20*s.*]

(*C 13.*) *Remedy for fines, &c.*] By the *§. 2 & 3 Ph. & M. 8.* and the *§. 5 El. 13.* Fines, assessed at the quarter sessions for offences against those acts, shall be estreated by the clerk of the peace, who shall deliver one part of the estreats indented to the constable and churchwardens of the parish, the other to the high constable, who shall levy the same by distress for the repair of the highways, and if no distress, or he pay not in twenty days, he shall pay double.

And the high constable shall yearly account, on pain of 40*s.* and the constable and churchwarden may call him or their predecessors to account before two justices of peace, who may commit till the arrears are paid, allowing 8*d.* in the pound for collection, and 12*d.* to the clerk of the peace.

By the *§. 18 El. 10.* Fines for any offence against this act shall be levied by distress and sale, as fines and amerciaments in leets, of which the justices of peace at sessions, and the stewards of leet, shall have cognisance.

By the *§. 22 Car. 2. 12.* Any convicted of resisting execution, or rescuing distress, &c. shall forfeit 40*s.* and on non-payment in seven days, shall be committed to gaol by any justice of peace near, till payment, for repair of the highway.

All presentments shall be in the county where the highway lies.

By the *§. 3 & 4 (or 3) W. & M. 12.* No fine, shall be returned into the *Exchequer*, but paid to the surveyor for repair of the highway. And if a fine imposed on a parish be levied on one or more inhabitants, on complaint, two justices of peace at special sessions may cause a rate for reimbursing him, which being confirmed by two justices of peace, the surveyor may collect and levy within a month and pay to him.

And none shall be punished by this act, unless prosecuted in six months after offence. And all offences shall be determined in the county.

By the *§. 1 Geo. 52.* if any fine, &c. be misapplied by any, he shall forfeit

forfeit 5*l.* to him who informs thereof, to be levied by distress and sale, &c.

And the surveyor for neglect of duty by this act, shall forfeit 40*s.* to be levied and disposed *ut supra*.

If the defendant upon an indictment be fined, he shall not be thereby discharged, but a *distringas* goes in *infinitum*, till the way be repaired. *R. 1 Sal. 358.*

But where a contract is made for performance of that which the justices have ordered, in the removal of filth, &c. the justices cannot compel a performance of the contract, but the order for it shall be void. *R. Ray. 433.*

So, notwithstanding these statutes, a man may be amerced in a leet for not scouring a ditch in a highway, *R. Ray. 250.*

[By *st. 13 Geo. 3. c. 78. ff. 47.* No fine, &c. for not repairing highway, and not appearing to indictment, shall be returned into exchequer, but paid to such person near the highway as court imposing fine shall direct, to be applied in repair; not accounting, to forfeit double. Fine imposed on parish, levied to one or more persons, special sessions may order assessment to reimburse, &c.]

[*st. 53. and by st. 13 G. 3. c. 84. ff. 39.* Persons damaging banks, bridges, posts, &c. forfeit on conviction by one justice, by one witness, or view of justice, from 5*l.* to 10*s.* or be committed to hard labour, from one month to seven days.]

[*st. 54.* Justices of corporations to act within their jurisdictions.]

[*st. 65.* On indictment or presentment, the court may order either party to pay costs.]

[*st. 66.* If parish-meeting agree to prosecute or defend, the surveyor may charge the expences agreed to at a meeting, or allowed by a justice, in his account.]

[*st. 67.* Notice of parish-meeting must be given in church the Sunday preceding, and in writing fixed on the doors three days before the meeting.]

[*st. 69.* Surveyor is a competent witness in all cases.]

[*st. 70.* The terms in the schedule to be used with necessary variations only, and no objection taken for want of form; and so, by 13 *G. 3. c. 84. ff. 72.*]

[*st. 72.* Persons resisting execution of this act, rescuing distress, or constable not obeying warrant, forfeit from 10*l.* to 40*s.* or to be committed for three months, or till payment. So, by *st. 13 G. 3. c. 84. ff. 75.*]

[*st. 73.* Penalties and forfeitures, and costs and charges, (not otherwise directed,) to be levied by distress, half to the informer, half to surveyor for repair; if surveyor informer, all for repair: for want of distress, party to be committed for three months, or till payment. If offender lives in another jurisdiction, any justice where he lives, may, on copy of conviction or order proved on oath, grant distress, or commit as aforesaid. So, by 13 *G. 3. c. 84. ff. 76. 78.*]

[*st. 74.* No person to be distrained till six days after he is served with the order. So, by *st. 13 G. 3. c. 84. ff. 77.*]

[*st. 75.* Prosecutor, if the penalty is 40*s.* may proceed before a justice, or by action; if he recovers shall have double costs. So, by *st. 13 G. 3. c. 84. ff. 79.*]

[*st. 76.* Only one recovery for the same offence. Ten days notice of

of action; action must be commenced in a month. So, by *§. 13 G. 3. c. 84. §. 79.*]

[*§. 77.* No conviction but on confession, oath of one witness, or view of justice in cases mentioned. An inhabitant is a competent witness; so by *§. 13 G. 3. c. 84. §. 74.* and justice may act, tho' a creditor or trustee.]

[*§. 78.* Justice may administer oath to any person for better discovery and execution. By *§. 13 G. 3. c. 84. §. 84.* justice or trustee may administer oath.]

[*§. 79, 80.* Distress shall not be unlawful, nor the parties trespassers, for want of form, nor the parties distraining trespassers *ab initio*, for subsequent irregularity; but party aggrieved may recover satisfaction for the special damage by action, but not if tender of amends is made before action brought; if no tender, defendant may before issue joined, pay money into court. So, by *§. 13 G. 3. c. 84. §. 80, 81.*]

[*§. 81.* Any person aggrieved may appeal to any quarter-session, giving notice six days after cause of complaint, entering into recognizance in four days after notice, to try it, and abide order. Justice, on such notice, to return all proceedings to quarter session, under penalty of 5 *l.* Quarter session to determine finally, and award costs to either party. Proceedings not to be quashed for want of form, or removed by *certiorari*. No appeal from conviction, unless the party for penalty or forfeiture shall at the time, if present, if not, in six days, give notice, and enter into recognizance. So, by *§. 13 G. 3. c. 14. §. 82, 83.*]

[*§. 82.* Action for any thing done in pursuance of this act, must be prosecuted in three months, and in the county where fact committed; defendant may plead general issue, and give act and special matter in evidence; and, on verdict for him, nonsuit, &c. treble damages. So, by *§. 13 G. 3. c. 84. §. 85.* and the action may be brought in the county where the defendant resides.]

By *§. 13 G. 3. c. 84. §. 33.* if turnpike-road is indicted, the court may proportion the fine between the inhabitants and the turnpike.

[*§. 42, 43.* Person destroying turnpike, or any part of it, or any bar, &c. erected to prevent passing without paying toll, or any weighing engine, or rescuing offenders, are guilty of felony, and may be transported for seven years, or imprisoned for three years, and may be tried in any adjacent county; and the damage shall be made good by the hundred; but if the offender is convicted in twelve months, they shall be repaid.]

[*§. 47.* Five trustees may direct indictments for nuisances at the expence of the turnpike; but not unless upon the confession of offender, or that a witness can be had.]

[*§. 48.* Information to favour offender is fraudulent, and a justice may proceed, as if there had been none.]

[*§. 64.* In action by or against trustee, the act or copy of order of his appointment, and evidence of his acting, shall be proof of his being trustee.]

[*§. 73.* Constable, &c. refusing or neglecting to execute, act, or to deliver a penalty, and surveyor, &c. neglecting for one week after the offence to inform, forfeit 10 *l.*]

(C 14.) *Justices of peace may inquire of a charity for repair of an highway.*] By the *st.* 22 *Car.* 2. 12. justices of peace at sessions may inquire of the value of lands given for repair of the highway, and order improvement and employment according to the will of the donor, unless given to a college or hall of an university, which hath a visitor of its own.

[By *st.* 13 *G.* 3. *c.* 78. *ff.* 52. justices in session may inquire of lands given to repair highways, and order improvement according to will of donor, if persons intrusted are faulty; except the lands are given to a college, &c. which has a visitor.]

(D) Private Way.

(D 1.) What shall be.

A PRIVATE way is such as goes to a church, house, vill, or close; and is not common for all the king's subjects. *Per Hale*, 1 *Vent.* 189. *Vide ante*, (A 1.)

So, it may be from a meadow, or close, to a street. 20 *Aff.* 18.

Or, to an highway.

So, it may be from one part of a close, across the ground of another, to another part of the same land. *Mod. Ca.* 3.

So, it may be through or across the highway to such a close. *R. Noy*, 9.

But a man cannot have a way from one part of the land of another to another part. *R. Mod. Ca.* 3.

(D 2.) How claimed.

(D 2.) *By prescription.*] A private way may be claimed by prescription, reservation, or grant, or for necessity. *Mod. Ca.* 3.

If a man prescribes for a way, which is now plowed up by the plaintiff who assigned instead of it a new way, which hath been used *abinde*, it shall be a good excuse for using the new way. *R. per* 3 *J. Yel.* 142. 1 *Brownl.* 212.

A man may prescribe for a way to a church, market, &c. thro' the close of another. *Bro. Chimin*, 2.

But it is not good, if he prescribes for a passage; for that does not import a way by land, but a way by water. *R. Yel.* 163. 1 *Brownl.* 216.

If he says, that the way is appendant or appurtenant; for it is not an interest, but an easement. *R. Yel.* 159.

If he does not say *a quo termino ad quem* the way goes. *R. Yel.* 164. 1 *Brownl.* 6. 216. *R. Mod. Ca.* 3. *Bro. Chimin*, 6.

And that the way is for men, horses, or carriages. *R. Yel.* 164. 1 *Brownl.* 216.

For, if he claims *viam equestrem & pedestrem* for carriages, without saying, *and* for carriages, it is not well. 3 *Leo.* 13.

If he says that the way goes from *B.* to a rectory; for the *terminus ad quem* is uncertain. *K.* 2 *Leo.* 10.

That it goes from *B.* to a close adjoining to a messuage in *B.* without saying in what parish the close was; for, tho' the messuage was in *B.* perhaps the close adjoining was not. *R. Lut.* 1528.

That it goes *de quadam pecia terræ cont. 4 acras*; for *pecia terræ* is uncertain. *R. after verdict.* *Lut.* 124. So,

So; if he says; that he is seised of *B.* and has a way through the close of the plaintiff to the *Thames*; for he ought to say, that he has a way from *B.* through the close of the plaintiff to the *Thames*. *R. Mod. Ca. 3.*

But if he prescribes for a way from *A.* through a close in *B.* to the town of *B.* or to *B.* it will be well; for the town of *B.* shall be intended the place where the houses continue. *R. Lut. 1508.*

So, if a lessee prescribes for a way, he ought to make a good title to himself from his lessor; and therefore, if he pleads a lease to him *habendum a die dat. ind. predict.* it shall be bad; for it was by indenture, it ought to be so pleaded. *R. Lut. 1528.*

But a man, who prescribes for a way through the close of *B.* need not say how many acres it contains. *Bro. Chimin, 6.*

(D 3.) *By grant.*] So, a man may claim a way by grant; as, if *A.* grants that *B.* shall have a way through such a close.

So, if *A.* covenants that *B.* shall enjoy such a way, it amounts to a grant. *R. 3 Lev. 305.*

If a man seised of *Black-acre* and *White-acre*, uses a way through *White-acre* to *Black-acre*, afterwards grants *Black-acre*, with all ways, &c. this way thro' *White-acre* shall pass to the grantee. *Mod. Ca. 3.*

So, if seised of two acres to which a way is appurtenant, he grants one acre, with all ways, &c. the way shall be granted. *Ibid.*

So, if a way be appurtenant to land, by a lease of the land the way passes to the lessee, without an express grant. *Pet 3 J. 2 Cro. 190.*

So, if a way be of necessity, the grantee of the land shall have it without a grant of the way; as, if a man enfeoffs another of land, which was encompassed by his other land, the feoffee shall have a way over the other land, without any grant. *R. 2 Cro. 170. R. Mod. Ca. 4. [Chichester v. Lethbridge, C. P. E. 11 Geo. 2. Willes, 71.]*

So, if there be not another way convenient. *R. 2 Cro. 170. 2 Rol. 60. l. 20.*

[Where one as a trustee conveys lands to another to which there is no access but over the trustee's land, a right of way passes of necessity as incidental to the grant. *Howton v. Frearson, B. R. M. 39 Geo. 3. 8 T. R. 50.* If the owner of two closes, having no way to one of them but over the other, part with the latter without reserving the way, it will be reserved for him by operation of law. *Semb. Ibid.*]

[*A.* the owner of a close situate within a close belonging to *B.* had a prescriptive right of way through *B.*'s to his own; twenty-four years ago *B.* stopped up the old way, and made a new way, which was constantly used till *B.* stopped up the new way; in an action brought by *B.* against *A.* for going over the new way, it was holden that *A.* could not justify using this way as a way of necessity, but that he should either have gone over the old way, and thrown down the inclosure, or brought an action against *B.* for stopping up the old way. *Reignolds v. Dillow, C. P. M. 15 Geo. 2. Willes, 282.*]

[The new way was only a way by sufferance during the pleasure of both parties; and *B.* by stopping it up determined his pleasure. *Ibid.*]

But if a man bargains and sells land with a way to it, the way does not pass; for the bargain and sale conveys only an use, and there cannot be an use of a way created *de novo*. *R. 2 Cro. 190.*

(D 4.) *For necessity.*] So, if a man has land, surrounded by the lands of another, he shall have a way thro' the land of the other, for the necessity. *R. Mod. Ca. 3. Vide ante, (D 3.)*

So, if a man has title to a wreck, he has a right to have a way over the land of another where the wreck lies, to take it, of necessity. *R. Mod. Ca. 149.*

A man, who uses navigation, has a right to a way over the land next the river where he navigates, if there be occasion. *Mod. Ca. 163.*

A way of necessity shall not be lost by unity of possession. *R. Lut. 1489.*

But, where a way is claimed for necessity, it will be a good plea, that the plaintiff has another way. *R. Mod. Ca. 4.*

Otherwise, where claimed by grant or prescription. *Mod. Ca. 4.*

(D 5.) How it shall be used.

If a man, upon a lease to *A.* for years, reserves a way to himself thro' the house of the lessee, to a back-house; he cannot use it but at seasonable times, and upon a request. *D. 1 Vent. 48.*

So, if a feoffor grants to a feoffee a way across his backside to a house and back again, he cannot use it to another place. *R. 1 Rol. 391. l. 20.*

So, if he grants a way from *D.* to *Black-acre*, and the feoffee afterwards purchases lands adjoining to *Black-acre*; he cannot justify the using the way to those lands. *R. 1 Rol. 391. l. 50. R. 1 Mod. 190.*

And therefore, in trespass if the defendant justifies for a way to *Black-acre*, the plaintiff in his replication may shew the special matter, that he used the way to lands adjoining to *Black-acre*. *1 Rol. 391. l. 50. R. Lut. 113, 4.*

But if the plaintiff replies, that the defendant used the way to *Black-acre*, and thence to the other lands, it is bad. *R. 1 Rol. 391. l. 40.*

But if *A.* has a way thro' the land of *B.* who plows up the soil where the way was used, and leaves another part of the same close for a way; *A.* may use the antient track, and need not go where the way is assigned *de novo*. *R. Noy, 128.*

[Under a grant of a free and convenient way for the purpose of carrying coals, among other articles, the grantee has a right to lay a framed waggon-way. *Senhouse v. Christian, B. R. H. 27 Geo 3. 1 T. R. 560.* Under a grant of a way from *A.* to *B.* in, through, and along a particular way, the grantee is not justified in making a transverse road across the same. *Ibid.*]

(D 6.) By whom it shall be repaired.

The grantee of a way has power to amend it, as incident. *Godb. 53. Semb. 1 Sand. 323.*

But if a man grants a way thro' his close to another, the grantor is not bound to keep it in repair, if it be foundrous. *1 Sand. 322.*

If a man be bound by prescription to the repair of a way, he need not keep it in better repair than it always was. *Mod. Ca. 163. 1 Sal. 358.*

But if it be impassable, a passenger may break the fence, and go *extra viam* as much as is necessary, to avoid the bad way. *Jon. 296, 7.*
(But

[But if the grantor be not bound either by prescription or his own agreement the grantee cannot justify going over the grantor's ground though the way be impassable. *Doug. 719.*]

(D 7.) Remedy for not repairing it.

If a common way to a church, vill, &c. be out of repair, he who ought to repair it may be indicted for it. *Mod. Ca. 163.*

And if he be convicted upon the indictment, the court will not set the fine till the justices of peace certify, that it is well repaired. *Mod. Ca. 163.*

And if he be fined before the way be repaired, yet a *distingas in infinitum* shall afterwards go against the party till the sheriff certify, that the way is in good repair. *Per Holt, Mod. Ca. 163.*

(D 8.) Obstruction.

If a private way be obstructed, an action on the case lies. *Vide Action upon the case, (A 2.)*

If he, who has the way, has a freehold, and also he who has the land in which, &c. an assize lies. *R. 3 Leo. 13.*

And it is sufficient to say, *quod obstruxit*, or *obstupavit*, generally, without saying how, viz. by a ditch, fence, &c. *R. 3 Leo. 13.*

If a way be thro' the yard of another, who erects a gate to his yard, he who uses the way may justify the breaking of the gate so erected, thro' which he could not pass, without saying, that it was locked. *R. upon demurrer, 3 Lev. 92*

CHIVALRY.

Vide Courts, (E 1, &c.)—Guardian (A).—Waste, (F 1.)

CHOSE IN ACTION.

Vide Assignment, (C 1.)—Grant (D).

CHURCH.

Vide Advowson.—Dismes, (E 1.)—Esglise, per Totum.—Prohibition, (F 3.—G 2 5.)—Quare Impedit (A).

Freehold of the Church.

Vide Esglise, (G 1.)

Parish Church.

Vide Esglise (C).

Repairs and Ornaments of a Church.

Vide Esglise, (G 2.)—Prohibition, (G 2.)

Seats in a Church.

Vide Action upon the Case for a Disturbance, (A—3.)—Esglise, (G 3.)

Churchwardens.

Vide Esglise, (F 1, 2, 3.)

Church Yard.

Vide Cemetery, (A 1, &c.)—Esglise (E).—Prohibition, (G 3.)

CINQUE-PORTS.

Vide Abatement, (D 3 5.)—Franchises, (E 1, &c.)

CIRCUITY of ACTION.

Vide Action (H).

CITIZEN.

Vide Burrough, (B 2.)—Parliament, (D 6.)

CITY.

Vide Burrough, (B 1.)—Courts, (O 1, &c.—P 1, &c.)—Parliament, (D 12.)

CIVIL LAW.

Vide Canons.

CLAIM.

(A 1.) Continual Claim.

IF a disseisee, or any one who has title to enter into the possession of another, makes continual claim, his entry shall not be taken away by a descent afterwards from the disseisor, or other tenant of the land. *Co. L. 250.*

So, the dying seised of the feoffee, or other who has title, as well as of the disseisor, and a descent to his heir, does not take away the entry of him who makes continual claim. *Co. L. 251. a.*

Continual claim is of the same effect as an entry; and the continuance in possession of the disseisor is a new disseisin *toties quoties*. *Lit. S. 429, 430.*

And if he in possession had only an estate-tail before, he has now a fee-simple by disseisin. *Lit. S. 429.*

(A 2.) How it shall be made.

A man, who makes continual claim to prevent a descent, ought to go to the land or parcel of it, if he dare. *Lit. S. 421.*

And make his claim upon the land. *R. Mod. Ca. 44.*

And if he dare not, for fear of death, battery, or mayhem, he ought to go as near to the land as he dare, to make his claim. *Lit. S. 421.*

Or, for fear of imprisonment. *Co. L. 253. b.*

(A 3.) By whom.

Continual claim ought to be made by him who has title to enter. *Lit. S. 416. Vide Forfeiture, (A 6, 7.)—Vide post, (B 2.)—Vide Condition, (G 1.)*

And therefore, if tenant for life, remainder in fee, be disseised, claim ought to be made by him in remainder. *Ibid.*

If he has right of entry, tho' he has no title to the profits immediately, he may make continual claim: as, if lessee for years, or tenant by statute merchant, staple, &c. be ousted, and the reversioner disseised, he in reversion may make continual claim, tho' he is not entitled to the present profits. *Co. L. 250. b.*

So, continual claim by tenant for life is sufficient for him in reversion or remainder. *Lit. S. 416.*

If continual claim be made by *A.* and then the disseisor or his feoffee dies seised, and the land descends, and then *A.* dies; his heir, upon this claim, may enter. *Co. Lit. 250. b.*

So, if a person who has right of entry commands his servant to make claim, and the servant comes to the land, and makes the claim, it is sufficient. *Lit. S. 433.*

So, if the master dare not go nearer the land than *D.* and commands his servant to go to *D.* and make claim, and the servant does, it is sufficient. *Ibid.*

So, if a recluse, a man languishing, or decrepid, commands his servant to make claim, and the servant goes as near as he dare, for fear of death, &c. and makes claim, it is sufficient. *Lit. S. 434.*

Otherwise, if the master was of good health; for he did not do all that his master dared do. *Lit. S. 435.*

(A 4.) At what Time.

By the common law continual claim did not avail, unless it was within a year and a day inclusive before the dying seised. *Co. L. 255. Vide post, (B 3.)*

But it was sufficient if claim was once made within the year and day before the dying seised, tho' the disseisor had possession for twenty or forty years after the disseisin. *Lit. S. 427.*

And tho' after the claim made, the disseisor enfeoffed a stranger, who died seised within the year and day, but before any new claim. *Lit. S. 425.*

Yet by the *stat. 32 H. 8. 33.* If a disseisor dies seised within five years after the disseisin, the entry of him who has right is not taken away, tho' he did not make continual claim.

But, if he survives the five years, continual claim ought to be made, as at common law. *Co. L. 256. a.*

When a descent shall toll an entry, unless it be avoided by continual claim. *Vide in Descent, (D 1, &c.)*

What shall be a disclaimer, and the effect of it. *Vide Disclaimer (A—B).*

(B) Claim to avoid a Fine.

(B 1.) How it may be made.

BY the common law, a fine might be avoided by the entry of his claim upon record under the foot of the fine (which is now taken away) by a *præcipe quod reddat*, brought of the land, by entry or continual claim. 2 *Inst.* 518. 2 *Leo.* 53. *Pl. Com.* 358. b.

But by the *st.* 4 *H.* 7. It must be by lawful action or entry.

And therefore, a man may avoid a fine by an action commenced within five years after his right accrues.

And it is sufficient, that the action be commenced within time, tho' he has not judgment or execution till seven years, or after. *Pl. Com.* 358. b.

So, a man may avoid a fine by actual entry, where his entry is not taken away.

By a claim to be heir, at the gate; if at the same time he enters upon the land, or house, tho' he does not make his claim there. *Skin.* 412.

So, by his claim among his neighbours, as near the land as he can, when he dare not enter, and his entry was congeable. *Pl. Com.* 358. b. *Vide ante*, (A 2.)

But if an action was commenced, and afterwards discontinued, that does not amount to a claim to avoid a fine. *D.* 1 *Vent.* 45. *R. Dal.* 107.

Nor an entry of his claim upon record *sub pede finis*. *R.* 4 *Leo.* 104.

So, the delivery of a declaration in ejectment does not amount to an entry. *R.* 1 *Sand.* 319. 1 *Mod.* 10. 1 *Vent.* 42. [*Oates v. Brydon*, *B. R. E.* 6 *Geo.* 3. 3 *Burr.* 1897. *Goodright v. Cator*, *B. R. M.* 21 *Geo.* 3. *Doug.* 485. *Tapner v. Merlott*, *C. P. T.* 12 & 13 *Geo.* 2. *Willes*, 177.]

Tho' the defendant afterwards appears upon it, and confesses lease, entry, and ouster. *R.* 1 *Sand.* 319. 1 *Vent.* 42.

[There must be an actual entry to avoid a fine; and if the demise is laid before the time of that entry, an ejectment cannot be maintained. *By all the Judges in Parliament.* *Barrington v. Parkhurst*, *H.* 11 *G.* 2. *Str.* 1086. *Andr.* 125. *Compure v. Hicks*, *B. R. M.* 38 *Geo.* 3. 7 *T. R.* 433. *T.* 38 *Geo.* 3. 7 *T. R.* 727. *Vide Estates*, (B 15.)]

[But if the actual entry is before the fine, and the demise laid after entry and before the fine, it is good, though the ejectment was brought after the fine. *Musgrave v. Shelly*, *P.* 21 *G.* 2. 1 *Wils.* 214.]

So, a bill in *Chancery* is not sufficient to avoid a fine. *Dal.* 116.

So, an entry by *cestuy que trust*, without a *subpæna*, is not sufficient to avoid a fine, as to the trust. *Ca. Ch.* 268. 278.

And no claim or other act can be sufficient to avoid a fine, as to a trust, but a *subpæna*. *Ca. Ch.* 278. 2 *Ca. Ch.* 126.

So, an entry is not sufficient to avoid it, where the fine makes a discontinuance; for it ought to be by action. 1 *Ver.* 213.

So, by the *st.* 4 & 5 *Ann.* 16. [*f.* 16.] No claim, or entry, of or upon any lands, &c. shall be of force to avoid any fine levied, or to be levied, with proclamations in *C. B.* county palatine, or grand sessions of *Wales*, unless upon such entry, or claim, an action shall be commenced within one year after, and prosecuted with effect.

[Actual

[Actual entry is not necessary to avoid a fine, without proclamations. *Jenkins v. Pritchard*, H. 30 G. 2. 2 *Willf.* 45.]

So, an entry into land not comprised in the fine, claiming that which was comprised, is not sufficient. *Hard*, 400.

Nor is an entry in land in one county, claiming land in another, sufficient for the land in the other county. *Hard*. 401.

Nor a claim at a gate in the street, without entry upon the house or land. *Skin*. 412.

Chancery will not supply a defect in an entry to avoid a fine. *Ca. Ch.* 278.

(B 2.) By whom.

A claim to avoid a fine may be made by him who has a present right. *Pl. Com.* 359. a. *Vide ante*, (A 3.)—Condition, (G 1.)]

So, if a stranger, of his own head, enters to avoid a fine, and he who has the right assents afterwards within five years, it is sufficient. *Co. Lit.* 245. a.

So, if one avoids a fine by entry or claim, it shall be avoided as to all others. *Pl. Com.* 358. b.

But an entry by a stranger to avoid a fine, without the assent of the party, precedent, or subsequent, is not sufficient. *Co. L.* 245. a. *R. 9 Co.* 106. a. *R. Cro. El.* 561.

So, an entry by a stranger, for a condition broken, does not avail without an express assent. *R. 2 Cro.* 57.

So, an entry by him in a remote reversion, or remainder does not avail; for it ought to be by him who had the present right. *Pl. Com.* 359. a.

(B 3.) At what Time.

An entry, action, or claim to avoid a fine, by the common law, ought to be made within a year and a day. *Pl. Com.* 357, 358.

But by the *st. de donis*, 13 *Ed.* 1. the issue in tail, or he in reversion, *neceffe non habet opponere clameum*; for, as to him, the fine *ipso jure est nullus*.

Yet the fine of tenant in tail makes discontinuance, which ought to be avoided by *formedon* by the issue, or him in remainder or reversion.

So, an infant, a man of non-sane memory, in prison, or out of the realm, was not bound to make claim within the year and day. *Pl. Com.* 359. b.

And not being bound to make claim, a non-claim, by the common law, does not prejudice them for ever. *Pl. Com.* 360. a.

So, if a man of full age, &c. who ought to make claim, dies within the year; his heir within age, &c. was exempted for ever. *Pl. Com.* 360. cont. *ibidem*, 371. 2.

So, by the *st.* 34 *Ed.* 3. 16. non-claim was ousted as to all persons.

For more of title claim, *Vide Condition*, (O 5.)—*Fine*, (K 1, 2.)—*Forfeiture*, (A 4.)—*Franchises*, (A 1, 2.)—*Officer*, (E 6.)—*Release*, (E 2.)

C L E R G Y.

Vide Appeal, (G 9.)—*Justices*, (Y 1, &c.)

CLERK.

Six Clerks.

Vide Chancery, (B 7.)

County Clerk.

Vide Viscount, (B 2.)—County.

Clerk of the Market.

Vide Market (H).

Clerk of the Peace.

Vide Justices of Peace, (D 5.)

Clerk of the Pipe.

Vide Courts, (D 13.)

Ignorance, or Misprision of the Clerk.

Vide Amendment, (D 1. 9.—E 1, 2.—G 2.—H 3.—T 1, &c.—V 1, &c.) and many other Places in the same Title.

CODICIL.

Vide Devise, (D 3.)

COIN and COINAGE.

Vide Justices, (K 7.)—Money, per Totum.—Prerogative, (D 39.)

COLLOQUIUM.

Vide Action upon the Case for Defamation, (G 7, 8, &c.)

COLLUSION.

Vide Covin.

COLOUR.

Vide Pleader, (3 M 40, 41.)

COMMAND.

Command of Forces.

Vide Prerogative, (C 3.)

COMMENCEMENT.

Commencement of a Lease.

Vide Estates, (G 8, 9.)

Commencement of Parliament.

Vide Parliament, (E 1.)

Commencement of Terms.

Vide Temps, (C 1, &c.)

COMMENDAM.

Vide Prerogative, (D 18, &c.)

COMMISSION and COMMISSIONERS.

Commission to take an Answer.

Vide Chancery, (K 3.)

Commission of Array.

Vide War, (B 3.)

Commission, and Commissioners of Bankruptcy.

Vide Bankrupt, (D 1, &c.)

Commission for Examination of Witnesses.

Vide Chancery, (P 2, &c.)

Commissioners of the Great Seal.

Vide Chancery, (B 1.)

Commission of Justices.

Vide Justices, (C 2. G 1.)—Prerogative, (D 29.)

Commission of Partition.

Vide Parcener, (C 10.)

Commission of the Peace.

Vide Justices of Peace, (A 6, &c.)

Commission of Rebellion.

Vide Chancery, (D 5.)

Commission for Review.

Vide Prerogative, (D 16.)

Commission, and Commissioners of Sewers.

Vide Sewers.

Commission for Visitation.

Vide Visitor, (A 3.)

Commission, and Commissioners of Charitable Uses.

Vide Uses, (N 14, &c.)

COMMITTEE.

Vide Parliament, (E 6, &c.)

COMMON.

(A) Common.

COMMON imports a privilege to take a profit in common with many. *Co. L. 122. a.*

And a man may have common of pasture, turbary, or piscary. *F. N. B. 180. L.*

So, common of estovers in a wood, minerals, &c. *Co. L. 122. a.*

Common is incident to the land to which it is appendant; and tho' it is to be taken in another parish, it shall be charged, &c. where the land lies. *1 Sal. 169.*

[Lands which are stinted for five months, and open for seven, and enjoyed with the other common, is part of the waste and common of the manor, and is included in a reservation of the waste, and all mines in it. *Gibson v. Smith, P. 1741. 2 Atkins, 182.*]

(B) Appendant.

THERE are four kinds of common of pasture; *appendant, appurtenant, common in gross, and common pur cause de vicinage.* *Co. L. 122. a.*

Common appendant ought to be time whereof, &c. *1 Rol. 396. l. 40.*

For it cannot begin at this day. *1 Rol. 396. l. 42. 26 H. 8. 4. a.*

Common appendant is of common right. *1 Rol. 396. l. 44.*

For if a man had enfeoffed others, before the statute of *quia emptores terrarum*, of lands, parcel of his manor, the feoffees should have common, for their commonable cattle, within the wastes, &c. of the lord, as incident to their feoffment. *2 Inst. 85, 6. Per 2 J. 1 Rol. 396. l. 45. 4 Co. 37.*

Common appendant shall be for the whole year.

Or, for a time limited; as, for the whole year, except when the lord depastures his cattle. *1 Rol. 396. l. 49.*

For the whole time after severance, until the land be sown again. *1 Rol. 397. l. 8.*

And in such case, if only part be sown again, the common continues in the residue.

For the time after the hay removed, till *Candlemas.* *1 Rol. 397. l. 10.*

From

From such a day to such a day. 1 *Rol.* 397. l. 12.

As long as he inhabits such a house, or pays so much. 1 *Rol.* 397.

l. 5.

For the time after severance, till the re-sowing every two years, and for the whole year every third year. 1 *Rol.* 397. l. 19.

Until the re-sowing with the assent of the commoners. R. 1 *Leo.*

73.

Common shall be appendant to arable land, not to a house. 1 *Rol.* 397. l. 28, 29.

Nor to a meadow, &c. nor any other than arable land. 26 *H.* 8. 4. a. 4 *Co.* 37. b. 1 *Rol.* 397. l. 29. [*Bennet v. Reeve*, C. P. M. 14 *Geo.* 2. *Willes*, 227.]

Vide appendant and appurtenant, (B 3.)

Nor to lands improved out of the waste, within time of memory. 1 *Rol.* 397. l. 31.

Yet if a man prescribes for common appendant to a house, cottage, &c. it will be well, for it has a curtilage, &c. R. 1 *Sal.* 169. R. 2 *Jon.* 227.

And it may be appendant to a manor, carue of land, &c. which comprehend a house, meadow, &c. but it shall be intended appendant only to the arable in it. R. 4 *Co.* 37. b.

So, if the arable be converted to pasture, the common remains. 4 *Co.* 37.

Common appendant shall be only for beasts of the plough, which till the land; as horses, oxen, &c. or for cattle which compost the land; as cows and sheep. 1 *Rol.* 397. l. 38. 4 *Co.* 37. a.

And therefore, if a man prescribes for common appendant for all cattle, it will be bad; for that extends to swine, goats, geese, &c. 1 *Rol.* 397. l. 43.

But, regularly, the cattle for which common appendant is claimed, ought to be *levant* and *couchant* upon the tenements to which, &c. 1 *Rol.* 398. l. 1. [*Bennet v. Reeve*, C. P. M. 14 *Geo.* 2. *Willes*, 227.]

[Therefore common appendant can be claimed only for so many cattle as are necessary to plough and manure the tenant's arable land. *Ibid.*]

Yet a man may claim common appendant for a certain number of cattle. 1 *Rol.* 398. l. 7.

[In a justification under a right of common, the cattle must be *commonable*, *his own*, and *levant and couchant*. 1 *Bur.* 320.]

(C) Appurtenant.

COMMON appurtenant originally began by express grant.

And a man must prescribe for it. *Co. L.* 122. a.

Or it may begin within time of memory. *Cro. Car.* 482. 26 *H.* 8. 4. a.

As, if a man claims common for all cattle, it is common appurtenant: for it includes swine, goats, geese, &c. 1 *Rol.* 397. l. 44. *Vide infra.*

If he prescribes, that he, and all those whose estate he has in such a house, have common in such a place for two beasts. 1 *Rol.* 399. l. 39.

That

That all the inhabitants in an antient messuage in such a vill have common in such a place; but it cannot extend to habitations erected *de novo*. *R. Sav. 81.*

If a man by bargain and sale sells *B.* to another, and afterwards grants common to the bargainee for all cattle which manure *B.* and afterwards the deed is inrolled; the bargainee shall have common as appurtenant to *B.* tho' his estate in it was not perfect at the time of the grant. *R. 1 Rol. 400. l. 7.*

Tho' the grant had no reference to the bargain and sale. *R. 1 Rol. 400. l. 7.*

So, if he grants common for cattle *levant* and *couchant* upon land, which he shall purchase within a month. *R. 1 Rol. 400. l. 19.*

Or, for cattle *levant* and *couchant* upon *B.* and he afterwards purchases it. *Dub. 1 Rol. 400. l. 27.*

If a man grants common to another within his manor or lands of *D.* it is good, tho' it does not appear that there is any waste there; for it is granted generally, within his lands of *D.* *R. upon a special demurrer, Cro. Car. 599.*

So, if he prescribes for pasturage in a meadow for two horses till the hay be moved, it is good. *R. 2 Cro. 27.*

A man may prescribe for common, as appurtenant to his manor, or freehold, for all cattle. *1 Rol. 401. l. 8.*

Or, for hogs *levant* and *couchant*. *1 Rol. 401. l. 29.*

Or, for a certain number of cattle, as 300 sheep, &c. without saying *levant* and *couchant*. *1 Rol. 401. l. 15. 2 Cro. 27. R. 2 Mod. 185.*

So, for cattle *levant* and *couchant* upon a messuage *cum pertinentiis*; for this comprehends a curtilage of an acre or more, upon which they may be *couchant*. *R. 2 Jon. 227. [1 Lord Raym. 726.]*

[No one can prescribe for common for his cattle *levant* and *couchant* as appurtenant to his house, without having a curtilage or land. *B. R. Mich. 33 Geo. 3. Scholes v. Hargreaves, 5 T. R. 46.*]

So, the lord may claim pasturage for two horses in 1000 acres of meadow till it be cut for hay; for so large a quantity cannot be much prejudiced by only two horses. *R. 2 Cro. 27.*

[Common of pasture, without land, may be parcel of a manor, tho' demised and demisable by copy of court roll; and if it be claimed by the lord of a manor in the soil of another for a certain number of cattle, without regard to *levancy* and *couchancy*, and be not claimed as incident to arable land, it will be taken to be common appurtenant. *Musgrave v. Cave, C. P. H. 15 Geo. 2. Willes, 319.*]

(D) In Grofs.

COMMON in grofs is such as is not appendant or appurtenant to any certain land. *Co. L. 122. a.*

And ought to be claimed by prescription, or by deed. *Ibid.*

As if a man who has common appurtenant for a certain number of cattle, grants it over to another, it shall be common in grofs. *R. 1 Rol. 402. l. 10. Cro. Car. 433. 2 Lev. 67.*

So, if a man grants common to another for his cattle, *ubicunque* the cattle of the grantor go, it will be common in grofs.

And if he doth not restrain the cattle of the grantee to any certain number, it is a common in grofs *sans nombre*.

So,

So, if he grants common *quandocunque averia sua ierint*. Cro. Car. 599.

So, common for the inhabitants of antient messuages in such a town. 2 Leo. 44.

So, common to the mayor and burgessees of such a town. R. 2 Lev. 246.

Yet common in grofs *sans nombre* is not good, if there be not some restraint or limitation; as, if a corporation prescribes for all of the corporation, for all their cattle commonable, without saying, *levant* and *couchant* within the same town, it is ill. R. 1 Sand. 346. *but Sand. not satisfied.* 1 Mod. 6. R. Jen. 298.

If A. claims common *sans nombre*, he ought to say *levant* and *couchant* upon such land. R. 2 Mod. 185.

But common appendant never can become common in grofs. 1 Rol. 401. l. 52.

Nor, common appurtenant for cattle *levant* and *couchant* upon such tenements. 1 Rol. 402. l. 2. Per Hale, 2 Lev. 67.

And, if common appurtenant be granted with a parcel of lands to which, &c. it shall be appurtenant to such parcel. R. 1 Rol. 402. l. 15. Cro. Car. 432.

[A man cannot prescribe for common appurtenant to a farm; because it is uncertain of what a farm consists, perhaps of 10 acres, or of 100; but the prescription ought to be laid to a messuage, and so many acres of land. Per Holt, 1 Lord Raym. 726.]

[If a man prescribe for common for a *certain* number of cattle, as appurtenant, &c. it is not necessary, nor material to shew that they are *levant* and *couchant*; because it is no prejudice to the owner of the soil, for that the number is ascertained. Id. Ib.]

(E). Pur Cause de Vicinage.

COMMON *pur cause de vicinage* is, when two or more towns have common in the fields within their towns, which are open to the fields of the neighbouring towns, and the cattle, put to use their common there, escape into the fields of the neighbouring towns, &c. *contra.* 4 Co. 38. b.

And therefore, this common is but an excuse for a trespass. Co. L. 122. a. 4 Co. 38. b.

So, where several persons have lands intermixt in an open field, and put their cattle at *shack*, viz. at large, to depasture there, which cannot be without trespassing the one upon the other; this is in the nature of common *pur cause de vicinage*. 7 Co. 5. a.

And if any one incloses, and after the inclosure the others have used after harvest to open his gates, and to intercommon there, the usage determines the right, and the owner who inclosed cannot exclude the others. 7 Co. 5. *Vide infra.*

Tho' he refuses to intercommon with them. 7 Co. 5.

When there is common *pur cause de vicinage*, one commoner cannot put his cattle into the lands of another vill, or manor, &c. but into his own lands only, and they must escape into the other. Co. L. 122. a. 4 Co. 38. b.

And if one vill or manor has 100 acres, and the other only 50, the latter can use the common only with cattle proportionable to the 50 acres. 7 Co. 5. b.

And

And he can use it only for cattle *levant* and *couchant* within his tenement or vill; for it is in the nature of a common appendant.

And therefore it ought to be claimed from time whereof, &c. as common appendant, tho' it be not so. *Per Wray*, 4 Co. 38. a.

If common be allowed *pur cause de vicinage*, the one lord of the manor or vill may inclose, and oust the others of common there. Co. L. 122. a. R. 4 Co. 38. b.

So, if the owner of land, where there is *sfack*, incloses, he shall hold in severalty, where by usage the inclosers there have done so. 7 Co. 5. b.

If several freeholders, who have lands in a common field, intercommon, one of them cannot prescribe to inclose against the others. *Adm. 2 Mod. 105. Vide supra.*

(F) Common; how it shall be used.

(F 1.) When it excludes the Owner.

IF tenants of a manor have common in the wastes, they cannot exclude the lord; for he by common right may put in his cattle. Co. L. 122. a. 1 Rol. 396. l. 10.

So, a grantee of common cannot exclude the owner. 1 Rol. 396. l. 13. 399. l. 2.

Tho' the grantee has common *sans nombre*. 1 Rol. 396. l. 13. Co. L. 122. a.

Nor tenants, who claim common of *estovers*. 2 Cro. 256, 7.

And they cannot prescribe to exclude the owner of the soil; for the word, *common*, imports it. Co. L. 122. a. 2 Rol. 267. l. 30.

If the owner of the soil aliens, saving his common; he may afterwards depasture there. 1 Rol. 396. l. 25.

And if there was not any saving, the alienee shall have common. 1 Rol. 396. l. 30.

But the lord or owner of the soil, by custom, may be restrained to two or three beasts. *Cont. 2 Rol. 267. l. 26. R. Yel. 129.*

Or, he may be restrained to a certain time.

[The right of commoners in a common may be subservient to the right of the lord in the soil; so that the lord may dig claypits there, or empower others to do so, without leaving sufficient herbage for the commoners, if such a right can be proved to have been always exercised by the lord. *Bateson v. Green*, B. R. M. 34 Geo. 3. 5 T. R. 411.]

So, the tenants of a manor may prescribe, that after the grass is mowed and put in cocks, the lord only shall put in his cattle till *Michaelmas*, and then the tenants only till *Lady-day*. *Per Brampton*, 2 Rol. 267. l. 10.

So, a man may prescribe, or allege a custom, to have the sole or several *vesturam terre*, or *pasturam terre* and exclude the owner of the soil. Co. L. 122. a.

So, the copyholders of a manor may allege a custom to have the sole pasturage in such a place, and to exclude their lord: for such usage may have had a good commencement. R. 2 Sand. 326. 2 Lev. 2. Pol. 13. 1 Mod. 74.

So, the freeholders may prescribe, that they, with the customary tenants, and the copyholders may allege a custom, that they, with the

the freeholders, have the sole pasturage. *Semb. 1 Sand. 352. Dub. 3 Mod. 250.*

So, a tenant may prescribe to have all thorns, &c. growing upon such a place; by which the owner shall be excluded. *R. 2 Cro. 256, 7.*

[But a prescription that *occupiers*, or *inhabitants* ought to have common is not good. *1 Lord Raym. 405.*]

[*Byss. 13 G. 3. c. 81.* Arable in common fields shall be ordered as three-fourths in number and value of occupiers direct for six years. Cottager or commoner without land is not excluded his full right, unless he consents in writing for an annual payment. If occupiers agree not to depasture in common, and allot what shall be such common for cottagers only, as shall be deemed an equivalent by a majority of them who have not compounded, they shall not have common on the other part. Person having separate sheep-walk, or pasture for cattle, not excluded from his right, unless he consents.]

[Balks, &c. may be ploughed with consent of lord of manor, and three-fourths of occupiers, except where it is a road. Boundary stones shall be erected.]

[Lords and three-fourths of commoners may let one-twelfth part of wastes for four years, the rents to be employed in improving the residue.]

[Or assessment may be levied for improving stinted commons, as lord and majority of occupiers direct.]

[Majority, with lord's consent, may postpone opening commons, stinted as to time for twenty-one days.]

[Two-thirds of commoners, with lord's consent, may open and shut common pastures, but a portion shall be reserved for those dissenting.]

[Stinted right of common for horses, &c. may, by majority of commoners, be commuted for sheep.]

[Persons otherwise disabled may agree under this act.]

[Tithe owners shall receive no gratuity for tithes, but by half-yearly or yearly payments.]

[The consent of occupiers is not valid, without an authority from proprietor.]

(F 2.) With what Cattle.

Common appendant, or appurtenant for cattle *levant and couchant*, may be used with cattle which he hires or borrows to plow, or manure his land: for they are his cattle. *1 Rol. 402. l. 39. 401. l. 39.*

And which yield nurture for his family. *1 Rol. 401. l. 43.*

So, with rabbits, or other beasts of warren, as well as other cattle. *R. Lut. 108.*

Common in a forest may be used with sheep. *Lut. 81. Vide in Chase, (O 3, 4.)*

Tho' it be in the fence month. *Lut. 81.* If he prescribes for it. *Pol. 447.*

[Rams must not remain on commons, from the 25th of *August* to the 25th of *November*. *13 G. 3. c. 81. s. 21.*]

But he who has common appendant, or appurtenant for cattle *levant and couchant*, cannot use the common with the cattle of a stranger. *1 Rol. 402. l. 34. 2 Sand. 327. Semb. Lut. 107.*

Nor can he license his tenants at will to put their cattle there. 1 *Rol.* 402. l. 36.

Nor can he use the common with cattle which he agifts. 1 *Rol.* 402. l. 34.

Or, which he has to sell. 1 *Rol.* 401. l. 46.

Nor can he grant over his common to another; for it is for cattle *levant*. R. 2 *Cro.* 15.

So, he, who has common in *grofs sans nombre*, cannot license a stranger to put cattle there. 2 *Sand.* 327.

Yet he who has common for a certain number of cattle may put in the cattle of a stranger. 1 *Rol.* 402. l. 43. *Cont.* l. 34. *Dub.* 2 *Cro.* 575.

So, he, who has the sole pasture may license a stranger to put his cattle there. R. 2 *Sand.* 327. 2 *Lev.* 2. *Pol.* 13. 1 *Mod.* 74.

And a license *pro hac vice* may be by *parol*. 2 *Lev.* 2. *Cont. Semb.* 2 *Sand.* 328.

So, he may use it for cattle not *levant* and *couchant*. R. 2 *Lev.* 2.

Yet after a verdict a license shall be intended by deed, tho' not pleaded. R. 2 *Sand.* 328.

(G) When the Lord may improve it.

THE lord could not improve the land where others have common by the common law. 2 *Inst.* 85. *viz.* against others who have common by grant; but against his tenants it was otherwise. 2 *Inst.* 474. 1 *Rol.* 365.

But now, by the *st. of Merton*, 20 H. 3. 4. the lord may improve, leaving sufficient pasture, ingress, and egress for his tenants.

[But where the tenants of a manor have a right to dig gravel on the wastes, or to take estovers there, the lord has no right under this statute, to inclose and approve the wastes of the manor. 2 *Term Rep.* 391.]

[Yet a custom in a manor, that any person being desirous of inclosing, may apply to the court, &c. first obtaining the consent of the lord, does not abridge the lord's common law right of inclosing without any such application, provided he leave a common sufficient for the tenants. *Ibid.* 392.]

And by the *st. W.* 2. 13 *Ed.* 1. 46. the *st. of Merton*, which extends to the lord and his tenants, shall hold between the lord and others who have common.

And therefore, the lord may improve his wastes against those who have common appendant, or appurtenant for cattle *levant* and *couchant* upon their tenements.

So, if the lord has common in the lands of the tenant, the tenant may improve. 2 *Inst.* 474.

[So, any person, who is seised in fee of part of a waste within a manor, may approve, having a sufficiency of common, though he is not the lord of the manor. *Glover v. Lane*, B.R. M. 30 Geo. 3. 3 T. R. 445.]

So, if the lord aliens the soil, where the common was taken, the alienee may improve. 2 *Inst.* 87.

The lord may improve *toties quoties*, if there be sufficient common left for his tenants. *Ibid.*

And

And if it be sufficient at the time of the improvement, though it afterwards appears to be insufficient, the improvement stands. 2 *Inst.* 87.

If the lord makes a feoffment of part of the waste, the feoffee may inclose; for the feoffment is an improvement. *Ibid.*

By the *β. W.* 2. 46. None shall be aggrieved by an assise of common of pasture, by reason of windmill, berkery, (*viz.* sheep or tan-house,) cow-house, necessary augmentation of his court-yard or curtilage. 2 *Inst.* 476.

And for these improvements the lord, &c. shall not be aggrieved, though sufficient common be not left. 2 *Inst.* 476. *Dub.* 1 *Lev.* 62.

And these instances are only for example; for the statute extends by equity, where the lord builds an habitation for his beast-keeper. 2 *Inst.* 476.

Where he builds a new house for his own habitation, and enlarges the curtilage. *Semb.* 1 *Lev.* 62. 1 *Sid.* 79.

But he ought to say, that it was for his habitation, and that it was necessary. *R.* 1 *Lev.* 62. 1 *Sid.* 79.

If the lord improves and incloses, and the fences are thrown down by persons unknown, by the *β. W.* 2. 46. the towns adjacent, if they do not indict the misdoers, shall be distrained to repair the same fences. 2 *Inst.* 476.

If they be thrown down by night or by day, if the persons be not known. *Lut.* 157.

And this if the misdoers are not indicted within a year and a day. 2 *Inst.* 476. *Lut.* 158. 1 *Roll.* 365. *Dist.* that a *disfringas* lies if the misdoers are not indicted within a convenient time, tho' the year be not passed. *Cro. Car.* 440.

And therefore a writ shall go to the sheriff to inquire what malefactors threw down the fences, and if he returns that it was by persons unknown, a *disfringas* goes against the inhabitants of the next towns, and to inquire of the damages. *Lut.* 141. 170. *Cro. Car.* 280. 440.

But a *disfringas* does not go for cutting down trees, if the fences are not thrown down. *R. Ray.* 487.

The writ need not shew a title to improve. *R. Cro. Car.* 280.

And it lies for the owner of the waste. *Sho.* 106.

For the grantee of the common. *Sho.* 106.

[The proceedings upon a *noctanter* must be of the crown side in *B. R.* *Rex v. Sudbury*, *H.* 11 *G.* *Str.* 622.]

[No costs are given on a writ of *noctanter*. *Str.* 1069. *B. R.* *H.* 355.]

At the return of the *disfringas*, the inhabitants may appear and plead to it; for the *disfringas* contains a *scire facias*. *Lut.* 157. *R.* 1 *Sid.* 107.

And therefore there is no occasion for a *scire facias* after the *disfringas*. *Lut.* 157.

And the inhabitants may plead that the persons were known. *Lut.* 175, 176. *R.* 1 *Lev.* 108.

That the damages are excessive. *Lut.* 147. 177. *R.* 1 *Sid.* 212. 1 *Mod.* 66.

Or any matter, which excuses the throwing down of the fences. *Lut.* 144. 176. [*Vid. B. R. H.* 355.]

That the misdoers are indicted. *Cro. Car.* 440.

And some inhabitants may plead one plea, and the inhabitants of another vill, another plea. *Lut.* 176.

So, two of every vill may plead for all. 1 *Lev.* 108.

If the vills plead to the damages, there shall not be judgment for the erection of the inclosures till the plea be determined. 1 *Mod.* 66.

But if the vills do not plead to the excessiveness of the damages, they shall be bound by them, tho' the jury afterwards find less damages. *R.* 1 *Sid.* 212.

And if at first they do not take protestation to the damages, they cannot afterwards traverse. *Ibid.*

And if they do not come at the return of the *disfringas*, they cannot afterwards plead. *Semb. Cro. Car.* 280.

If the vills do not plead, another *disfringas* goes to levy the damages found. *Cro. Car.* 280. *Jon.* 306.

[*By stat.* 29 *G. 2. c.* 36. Owners of common, with consent of majority in number and value of commoners; majority of commoners, with consent of owners; any persons with consent of both, may inclose any part of common for growth of wood. If wood destroyed, offender may be punished according to 1 & 6 *G. 1.*; if not convicted in six months, the owner shall have satisfaction from the adjoining parishes, &c. as for fences overthrown by *stat. Westm. 2.* Person cutting wood on common shall incur the same penalty.]

[*By stat.* 31 *G. 2. c.* 41. The recompence is to be paid to persons interested, in proportion to their interest. Tenants for life or years determinable on lives, may consent for their term, but that binds not after determination of their estate.]

But the lord cannot improve against him, who has common in gross *sans nombre*. 2 *Inst.* 86.

Nor when he has common in gross, though it be for a certain number. 2 *Inst.* 86. 475. *Semb.* 1 *Roll.* 365.

So, the lord cannot improve, where the tenant has common of *turbary, piscary, estovers*, &c. 2 *Inst.* 87.

[The lord, or his grantee, may inclose and approve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the common, as a right to dig sand, &c. if he have sufficient common of pasture. *Fawcet v. Strickland*, *C. P. E.* 10 *Geo. 2. Com. Rep.* 578. *Willes' Rep.* 57. *S. C. Shakspere v. Peppin*, *B. R. T.* 36 *Geo. 3. 6 T. R.* 741.

So, the lord cannot, upon pretence of an improvement, dig pits for coals, &c. 1 *Sid.* 106.

So, the lord cannot improve. without leaving sufficient common.

Tho' he assigns sufficient in other lands. 2 *Co.* 25.

Tho' he alleges a prescription to improve; for that denies the right of common. *R.* *Jon.* 375.

If the lord improves, and does not leave sufficient common, the commoner may throw down the whole inclosure; for it stands upon his common. 2 *Inst.* 88.

But in an assise in such case the jury cannot find generally for the plaintiff, but ought to assign how much shall be sufficient. *Ibid.*

(H) What Interest the Commoner has.

THE commoner has no interest in the soil where he takes his common; and therefore he cannot meddle with the soil to dig there, &c. *Bridg.* 10. [*Vid.* 1 *Bur.* 265. 267.] He

He cannot take wood, hay, or other profit there growing. 2 *Leo.* 202. *Bridg.* 10.

He cannot cut down bushes, fern, &c. without special custom; tho' they prejudice his common. *Bridg.* 10.

[A commoner, tho' he has by custom a right to cut fern, may not scatter the ashes which a stranger has made by cutting and burning it. *Woodson v. Newton*, T. 13 G. *Str.* 777.]

Nor grant his common to the use of another. *Bridg.* 10.

Nor make a trench to let out water which surrounds it. 1 *Rol.* 406. l. 17. *Semb.* 12 H. 8. 2. 15.

Nor stop up coney-borows, though his cattle fall and perish in them. 1 *Rol.* 405. l. 25. 2 *Bul.* 116.

[Even if the common is furcharged, but must bring his action. *Cooper v. Marshal*, P. 30 G. 2. 1 B. M. 259. *Cope v. Marshal*, P. 30 G. 2. 1 B. M. 268. 2 *Wilf.* 51.]

Nor kill the rabbits. R. 1 *Rol.* 405. l. 15. 20. 2 *Leo.* 201. 2 *Bul.* 116.

Though he allege a custom, or prescription to do it. *Semb.* *Bridg.* 10.

He cannot enter upon the soil, when he does not put his cattle there. 1 *Rol.* 406. l. 8.

Nor agist the cattle of a stranger there. 2 *Leo.* 202.

He cannot maintain trespass for damage to the soil or grafs; for he has no interest, but to take the pasture by the mouths of his cattle. 12 H. 8. 2. 8 *Rol.* 552. l. 7.

Nor an action upon the case against a stranger, if his rabbits go upon the common, for he may kill them. R. *Cro. Car.* 387. 1 *Rol.* 405. l. 39.

But a commoner may justify his entry, to put his cattle upon the common.

Or to see whether the grafs be good, for the depasturing of his cattle. 1 *Rol.* 406. l. 10.

So, he may reform an abuse to the soil; as he may dig down mole-hills. 1 *Brownl.* 228. 12 H. 8. 2.

Fill up with earth holes dug there. 1 *Brownl.* 228.

Let out water from a pond made there by the lord. *Ibid.*

Make a causeway for cattle to come there. *Per Pollard*, 12 H. 8. 2.

So, he may throw down inclosures, which prevent his coming to his common. *Semb.* 2 *Inst.* 88. *Bridg.* 10. *Vid.* 1 *Bur.* 265. 267.

Put in his cattle, though the owner has sowed the land. 2 *Leo.* 202.

Throw down the inclosure of the common, though he do not put his cattle there at the same time. R. *Litt.* 38.

So, he may throw down fences, which are erected upon his common. R. 2 *Mod.* 65.

So, he may distrain the cattle of a stranger there *damage-feasant* 1 *Rol.* 405 l. 42. *Adm. Yelv.* 129. 2 *Leo.* 202.

Or drive them out with a little dog; without being compelled to distrain. R. 4 *Co.* 38. b.

[But he cannot cut down trees planted by the lord on the waste, although there be not a sufficiency of common left. *Sadgrove v. Kirby*, B. R. M. 36 Geo. 3. 6 T. R. 483. *Kirby v. Sadgrove*, *Exchequer Chamb. E.* 37 Geo. 3. 1 *Bos. & Pul. Rep.* 13.]

So, if the lord, by custom, be restrained to a small number of cattle, and he puts more there; they may be distrained by him who has common. *Per three J. Yel. 129.*

So, if the lord puts in his cattle before the time for common, when by the custom it should be fresh. *R. 1 Rol. 405. l. 55.*

[Wherever there is colour of right for putting in cattle, commoner cannot distrain, where no colour he may, so he may distrain a stranger's cattle, but not those of a commoner, though he exceeds his number. Where writ of admeasurement lies he cannot distrain, Whether he may distrain cattle surcharged where the right of common is for a number certain? *2. Hall v. Harding, P. 9 G. 3. 4 B. M. 2426. 1 Bl. Rep. 673.*]

So, a commoner shall have an action upon the case against him who prejudices his common, an assise, or a *quod permittat*. *Bridg. 10. Vide post. (I).*

Tho' the prejudice to the common be by digging clay, and laying and carrying it across the common; tho' he has no interest in the clay or soil. *R. Godb. 344. 2 Rol. 308. 344.*

Though the defendant himself has common there. *R. Godb. 344.*

But if a commoner avows a distress for *damage-feasant*, he ought to allege, *quod communiam tam amplo modo habere non potest*. *R. 3 Lev. 104.*

Vide post. (I).

(I) What Remedy the Commoner shall have.

An Assise, &c.

IF the commoner has an inheritance, or estate for life, in his common, and is disseised, he shall have an assise. *F. N. B. 180. L. Vide Assise, (B 2.)*

Tho' the lord himself disseises him; as if he surcharges the common, or approves, and does not leave sufficient for the commoner. *F. N. B. 125. D.*

So, if the commoner be disseised, he may have a *quod permittat* in the county, or *C. B.* *F. N. B. 123. F. Vide Quod permittat.*

Or, if his ancestor was disseised; but not in other degrees. *F. N. B. 123. H.*

So, if tenant in *ancient demesne* be deforced of his common, he may have a writ of right close for it. *F. N. B. 11. K.*

If a commoner surcharges the common, another commoner may have a writ of admeasurement of pasture, whereby the number of the cattle with which the defendant, the plaintiff, and other commoners, who are not parties, may common, shall be ascertained. *F. N. B. 125. B. 126. H.*

And this writ is *viscontiel*, and not returnable; upon which the plaintiff shall make plaint in the county court, as in *replevin*; and the sheriff by precept shall warn the defendant; and if he pleads nothing, or confesses it, he shall make admeasurement. *F. N. B. 125. C. G.*

And upon this shall go an *alias* and *pluries*, and if nothing be done upon it, nor cause shewn, an attachment against the sheriff. *F. N. B. 125. F.*

Or,

Or, it may be removed by *pone* into C. B. where the plaintiff shall count, and have admeasurement. *F. N. B. 125. F. 126. A.*

By the *st. W. 2. 7.* After removal into C. B. a *distringas* goes to make proclamation at two county courts, and upon default, judgment. *F. N. B. 125. G. 126. C. 2 Inst. 368.*

By *W. 2. 8.* If the defendant in admeasurement of pasture, afterwards surcharges, a writ of *de secunda superoneratione* lies; upon which he shall render damages, and forfeit the cattle surcharged to the king. *2 Inst. 370. F. N. B. 126. E.*

But the writ of admeasurement of pasture does not lie by the lord; nor by tenant against the lord; nor for common *sans nombre*, *F. N. B. 125. D.*

So, if a commoner be disturbed, whereby he cannot use his common, or cannot use it in *tam amplo modo*, he may have an action upon the case. *9 Co. 112. b. Vide Action upon the Case for a Disturbance, (A 1.)*

So, if the lord, or a commoner, surcharges the common, whereby the plaintiff has not sufficient common, an action on the case lies. *Lut. 107. Atkinson v. Teasdale, P. 12 G. 3. 3 Will. 278. [2 Bl. Rep. 817.]*

[One commoner, who has surcharged, may nevertheless maintain an action against another for surcharging the common, *Hobson v. Todd, B. R. M. 31 Geo. 3. 4 T. R. 71.*]

[And the plaintiff needs not shew that he turned on any cattle of his own at the time of the surcharge, but only that he *could* not have enjoyed his common so beneficially as he ought. *2 Bl. Rep. 1233.*]

So, if the lord or another drives his cattle out of the common. *Lut. 103.*

If a man claims common, where he has no right, the owner seised in fee shall have a *quo jure*. *Vide Quo Jure.*

[If plaintiff claiming right to cut rushes on a common cuts some which defendant takes away, trover lies. *Rackham v. Jesup, M. 13 G. 3. 3 Will. 332.*]

[Against a stranger for cutting and taking away rushes. Trespass and trover in one declaration. *Beau v. Bloom, M. 14 G. 3. 3 Will. 456. 2 Bl. Rep. 926.*]

Vide ante (H).

(K) What Remedy the Lord shall have.

SO, if the lord has prejudice in his soil, where the common is, he shall have remedy by action, as in his other lands.

[In trespass by the lord against a commoner, for destroying his peat and filling up the holes, if defendant justifies under common appendant to his house, that plaintiff had dug holes, and laid up heaps, whereby he could not enjoy *tam amplo*, &c. therefore justifies removing heaps, and filling holes, doing as little damage as possible; and plaintiff replies *de injuria sua propria absque tali*, &c.: Sufficiency of common left cannot be given in evidence. *D'Ayrolles v. Howard, P. 3 G. 3. 3 B. M. 1385.*]

If the cattle of a stranger are in the common, he may drive them out, or impound them. *3 Lev. 41.*

Or maintain trespass.

So, if the lord sees the cattle of a stranger, he may drive the cattle of a commoner with them to pound upon the waste, in order to sever them, without a custom for doing it. *R. 3 Lev. 41.*

So, by custom he may drive the cattle of a commoner, to see whether the cattle of a stranger be there, or whether the common be surcharged; but not without a custom alleged. *3 Lev. 41. 2 Lev. 87.*

And if the common be surcharged, he may detain the cattle driven, till satisfaction for the trespass, without a prescription for it. *R. 2 Lev. 87.*

If the tenant himself surcharges the common, the lord may distrain the beasts, as *damage-feasant*. *F. N. B. 125. D.*

So, if the tenant puts in cattle not *levant* and *couchant*, where he has common only for cattle *levant* and *couchant*. *2 Rol. 706. l. 50.*

Or the lord shall have trespass against his tenant.

But if the lord sets up a stack of corn, &c. upon the common he cannot drive away the cattle which have common there; for it was his own fault. *R. 2 Cro. 271.*

(L) How Common shall be extinguished.

IF a man purchases land where his common is to be taken, whereby he has as high an estate in the land in which, &c. as in the land to which the common is appendant or appurtenant, the common shall be extinguished. *R. 4 Co. 38. a. R. Cro. El. 570. Mo. 462, 3. Vide Suspension, (B, &c.)*

So, if a copyhold to which common belongs, is destroyed, the common is gone. *Vide Copyhold, (K 6.)*

So, if he, who has common appurtenant, purchases parcel of the land in which, &c. the whole shall be extinguished. *Co. L. 122. a. R. 8 Co. 79. R. 1 And. 159.*

So, if he who has common in gross, &c. *Co. L. 122. a.*

But if a man, who has common appendant, purchases part of the land in which, &c. it shall be apportioned; for it is of common right. *Co. L. 122. a. R. 4 Co. 38. a. R. Mo. 463. 644. 8 Co. 79. a.*

And he ought to prescribe for the whole till such a day when he purchased, &c. *4 Co. 38.*

So, if a man, who has common appurtenant, sells parcel of the land to which, &c. it shall be apportioned. *Co. L. 122. a. R. 8 Co. 79.*

And the alienee may prescribe as for common appurtenant to his parcel. *8 Co. 79.*

Or, if common be for a certain number, the owner may sell all his common with parcel of his land to which, &c. and the whole shall be appurtenant to that parcel. *R. 1 Rol. 402. l. 25. Cro. Car. 432.*

Yet if a commoner purchases the improved part of the waste, his common shall not be extinguished; for by the approvement it was wholly severed from the manor. *2 Inst. 87.*

(M) How suspended.

SO, if a commoner who has common appurtenant, takes a lease of part of the land in which, &c. for life or years; all his common shall be suspended during the term. *R. 8 Co. 79. a.*

Vide Suspension.

(N) When it is not destroyed.

IF all the inhabitants of a vill have common in such a place, and the ancient messuage of any of them falls, and a new one is built upon the same foundation, the common remains. *R. 2 Leo. 45.*

Or, if he builds a new house in the same place. *2 Leo. 45. Godb. 97.*

But if the inhabitants of a vill claim common, and any one builds a new messuage there, where there was none before, he shall not have common; for it belongs only to the antient inhabitants. *R. 2 Leo. 44.*

(O) When revived by a new Grant.

IF a common be extinguished by unity of possession, if a lease be made of the land to which, &c. with all commons therewith used or enjoyed; that amounts to a new grant of the common for years, if there be an averment that it was used. *R. Cro. El. 570.*

Vide more concerning common in Copyhold, (K 6.)—Chancery (2 P.)—Pleader, (3 K 24.)

Tenant and Tenancy in Common.

Vide Abatement, (E 10.—F 6.)—Chancery, (3 V 4, &c.)—Devise, (N 8.)—Estates, (K 8.)

COMMON ANNOYANCE.

Vide Justices of Peace, (B 24, &c.)—Leet, (L 12, 13.)

COMMON BENCH.

Vide Courts, (C 1, &c.)—Pleader, (C 4. 11, &c.—3 B 2.—Quod permittat, (D 2.)

COMMON COUNCIL.

Vide Franchises, (F 25.)—London (F).

COMMON LAW.

Vide Chancery, (C 1.—D 9.—X—4 V).—Copyhold, (K 4.—P 3.)—Ley (B).—Parliament, (R 12. 23. 27.)—Prohibition, (F 10. G 22.)—Trade, (A 6, 7.)

COMMON RECOVERY.

Vide Chancery, (4 K 1, 2.)—Estates, (B 27, &c.)—Execution, (A 6.)—Recovery, (B 1, &c.)

COMMONS.

Vide Parliament, (D 4.—G 10.—L 14, &c.)—*Scotland*, (D 5.)

COMPERUIT AD DIEM.

Vide Pleader, (2 W 31.)

COMPOSITION.

Vide Dismes, (E 2. 21.—L 2.)—*Pleader*, (2 G 6.)

CONCEALED LANDS.

Vide Prærogative, (D 65.)

CONCLUSION.

Vide Abatement, (E 16.)—*Estoppel—Pleader*, (C 84. E 28, &c.—F 5, —S 35, &c.)

CONCORD.

Vide Accord.—Fine, (E 9, &c.)

CONDITION.

(A 1.) Condition in Deed.

A MAN may annex to an estate a condition, by the performance or non-performance of which the estate may commence, or may be enlarged or defeated. *Co. L. 201.*

And this may be by exprefs words in the deed, or by implication of law. *Ibid.*

An exprefs condition cannot be without deed. *Co. L. 225.*

And therefore, a man cannot plead a condition to defeat an estate of freehold, without shewing the deed. *Co. L. 225. Vide Pleader*, (O 1, &c.)

Otherwise, where a condition is annexed to a chattel personal or real; as a term for years, ward, &c. *1 Rol. 413. l. 20. 25.*

So, a condition to a freehold may be referred to a matter not in writing, and may be supplied by averment:

As if a corrody be granted for life, *sec. quod per. A. prius usitat. fuit*; it may be averred, that the corrody of A. was upon condition to attend the master, &c. *1 Rol. 413. l. 50.*

If an annuity be granted *pro consilio* generally, it may be averred, that the grantee was learned in the law, and the annuity was for his counsel in the law. *1 Rol. 413. l. 52.*

So, a condition precedent, upon which an estate shall be created, may be without deed. *Co. L. 216. a.*

(A 2.) By what Words it shall be created.

(A 2.) *In the grants of a common person.*] Divers words of themselves make an estate upon condition. *Lit. S. 328. Vide post.* (A 9, 10.)

As,

As, *sub conditione*. Lit. S. 328. 10 Co. 42. a.

Proviso semper. Lit. S. 329.

And the word *proviso* makes a condition, tho' joined with other words; as, *provided always, and it is covenanted*. Co. L. 203. b. 2 Co. 71. b. 1 Rol. 410. l. 30.

Provided, and it is agreed, &c. 2 Co. 71. b. R. Cro. Car. 128.

And therefore, if the word *proviso*, be the speaking of the grantor, feoffor, donor, &c. and obliges the grantee, &c. to any act, it makes a condition, in whatever part of the deed it stands; and tho' there be covenants before or after, it is not material. R. By all the Judges, 2 Co. 70, 71, &c. Cromwell. R. Dy. 311. b. Per two J. Dy. 13. b.

So, tho' it stands indifferent, whether it be the word of the lessor or the lessee; as, *provided, and it is agreed between the said parties*; for it shall be referred to the lessor. 1 Rol. 407. l. 50. Dub. Dy. 152. Acc. Dy. 6. b.

And tho' all the residue of the words be the speaking of the grantee, and words of covenant, as *provided, and the grantee covenants, &c.* R. 2 Co. 71. b. R. Mo. 707. R. Jon. 169.

So, words of limitation, if they cannot be taken as a limitation, shall be taken for a condition. Eq. Abr. 105.

Otherwise, if the word *proviso* be annexed only to make a qualification, and not to defeat the estate. Mo. 307. 2 Co. 72. a. Mo. 707.

[*Proviso*, if lessee commit waste, the lease shall determine; is a condition, not a covenant. Birchall v. Smethurst, T. 1722. Bunb. 114.]

So, the words *ita quod*, make a condition of themselves. Lit. S. 329.

And *quod si contingat*. Lit. S. 330.

But not without a conclusion, that it shall be lawful to the lessor to re-enter. Lit. S. 331. Pol. 75.

So, other words make a condition, if there be added a conclusion with a clause of re-entry. As, *If*. Co. L. 204. a.

Or though the conclusion does not give a re-entry, but says only, *that if the feoffee, &c. doth, or doth not, such an act, the estate shall cease, or shall be void*. R. 1 Rol. 408. l. 15.

Or, *that the feoffment shall be void*. R. 1 Rol. 408. l. 20. 25.

Or, *that the deed of feoffment and livery shall be void*; for that is of the same effect as if he had said *the feoffment*. Dub. 2 Rol. 408. l. 30.

So, if after the feoffment, the feoffee by another deed grants, *that if he doth not such an act, the first deed shall be void*. 1 Rol. 408. l. 38.

So, if the conclusion be, *that the feoffor shall take back his estate*. 1 Rol. 408. l. 50.

So, *ea intentione*, with a clause of re-entry, makes a condition. Semb. 1 Rol. 407. l. 37. Dy. 138. b.

So, to avoid a lease for years, which is but a chattel, there is no need of such precise words as to avoid an estate of freehold. Co. L. 204. a.

And therefore, if the lessor says, *quod non licebit for the lessee to sell, grant, &c. sub pœnâ forisfacturæ*, that makes a condition. R. Dy. 65, 6. Co. L. 204. a. Or says, *and the lessee shall dwell on the premises on pain, &c.* Co. L. 204. a. Dy. 79. a.

So, if the lessor covenants *that he will, &c. sub pœnâ forisfacturæ*. 1 Rol. 408. D.—Semb. Cro. El. 202. R. 2 Cro. 398. 1 Leo. 246.

So,

So, in grants executory, the cause, or consideration of the grant makes a condition. *Co. L. 204. a. 10 Co. 42. a. 1 Sand. 320. 2 Sand. 352.*

As, if a man grants an annuity *pro acra terra*, or *pro decimis*, which are evicted, the annuity ceases. *Co. L. 204. a.*

Or, *pro consilio*, or *quod prastaret consilium*, if the grantee refuses his counsel. *Co. L. 204. a.*

Otherwise, if a man grants an estate of inheritance, or freehold, *pro consilio*, or *pro acra terra*, the annuity does not cease if the counsel be refused, or the land evicted. *Co. L. 204. a.*

Yet a feoffment by a woman *causa matrimonii pralocuti* determines upon the marriage, or if the feoffee refuses the marriage. *Co. L. 204. a.*

Otherwise, if the feoffment be by the man to the woman; for the woman shall be favoured in respect of the modesty of her sex, which does not permit her to take counsel in such a case. *Co. L. 204. a.*

If a condition has false *Latin*, yet if the sense may be known, it is good. *1 Rol. 413. l. 30.*

(A 3.) *In the king's grant.*] So in the king's grant, words make a condition, which do not make a condition in the deeds of a common person. *Co. L. 204. a.*

As, *ad effectum*, or, *ea intentione*. *Ibid.*

So, *ad faciendum*, or *faciendo*. *Ibid.*

Ad propositum, &c. *Ibid.*

Ad solvendum. *10 Co. 42. a.*

But if at the end of a charter, by which a grant is made of an advowson, there be a clause, *quod concessimus that the grantee may amortise to a chantry to sing for the souls of our progenitors*; this does not amount to a condition, but to a license. *R. 43 Ed. 3. 33, 34. Fitz. Condition, 7. 1 Rol. 407. l. 30.*

(A 4.) *In a will.*] So words in a will make a condition, which will not make it in a deed: As if a man devises land to another, *ad faciendum*, or *ea intentione that he do such a thing*; this makes a condition. *Co. L. 204. a.*

Vide Devise, (N 9, 10, 11.)

So, if he devises to another *ad faciendum*, or *ad propositum*, *that he do*, &c. *Co. L. 204. a.*

So, if he devises *to sell*. *1 Rol. 401. l. 45. Co. L. 236. b.*

Or, *ad solvendum*, or *paying*. *Co. L. 236. b. 1. Leo. 174. R. Cro. El. 146. Mo. 853.*

So, a devise to *A. provided, and my will is, that he keep it in repair*, makes a condition. *R. 1 Leo. 174.*

So, there shall be a condition in a will, though there be no words that the estate shall cease; as a devise to a wife, *provided that she shall have the rent only if she departs out of London*. *Per cur. Cro. El.*

But if the words be insensible, and the intent uncertain, they shall not be construed as a condition.

A devise to *A. and his heirs, upon trust that he shall do*, &c. is a trust, but does not make a condition. *R. Mod. 594.*

(A 5.) *In Obligations.*] So in obligations there need not be such precise

precise words ; for, if the words be, *The condition is, that if A. do not grant, &c. the obligor covenants that he will grant* ; it is a good condition, *R. 1 Rol. 409. l. 10. Vide Obligation, (B 1. E.)*

So, if the words be, *Now it is agreed that if A. pay, the bond shall be void.* *R. 1 Rol. 409. l. 15.*

(A 6.) What Words do not make a Condition.

But in grants of a common person, *ad faciendum, ad effectum, ad propositum*, or *ea intentione*, do not make a condition. *Co. L. 204. R. Dy. 138. b.*

So, words of covenant or grant of a lessee do not make a condition. *Per two J. Dy. 6. a.*

So, words in restraint of a grant do not make a condition ; as if the lessor grants *fire-bote, provided that he do not take it of the great trees* ; it will be waste, but no cause of re-entry, if he does take it of the great trees. *R. 3 Leo. 16.*

So, words insensible do not make a condition : As a lease for forty years, upon condition *if she lives so long, and keeps herself sole*, without more, does not make a condition ; for the intent is uncertain. *R. 1 Rol. 411. l. 23. Poph. 99. Cro. El. 414.*

Nor words to a foreign intent ; as if a feoffment be to *A. & si contingat that he dies in the life of the feoffor, that he pay an annuity to B.* *Per Pol. 75.*

Or repugnant, or uncertain. *Pol. 76.*

(A 7.) To what Estate it may be annexed.

A condition may be annexed to an estate of inheritance, freehold or for years.

So, it may be annexed to a grant of tithes by the clergy. *1 Rol. 412. l. 53.*

If a feoffment be of two acres, a condition may be, that he shall re-enter into one. *1 Rol. 412. l. 50.*

So it may be annexed to an use, and shall be executed by *β. 27 H. 8.* so that the donor and his heirs may take advantage of the condition. *R. Sav. 77.*

(A 8.) In what Conveyance.

A condition may be annexed to a devise, as well as to another conveyance. *1 Rol. 412. l. 25.*

And to a devise since the *β. 32 & 34 H. 8.* as well as to a devise by the common law. *1 Rol. 412. l. 27.*

Or to a devise of an use by the common law. *1 Rol. 412. l. 25. Dy. 127.*

So, a lessee may surrender to the lessor, upon condition. *1 Rol. 412. l. 20.*

And a surrender of a copyhold may be upon condition. *1 Rol. 412. l. 17.*

So, a release of an estate may be upon condition.

And a confirmation. *1 Rol. 412. l. 22.*

And a release of a right. *Co. L. 274. b. 1 Rol. 412. l. 15.*

So, a contract may be upon condition. *1 Rol. 413. l. 4.*

And a charter of pardon. *Co. L. 274 b.*

And

And a grant of denization. *Co. L. 274. b.*

So, a release of a personal thing may be upon a condition precedent, but not upon a condition subsequent; for a personal action once suspended shall be extinguished. *R. 1 Rol. 412. l. 30. 35.*

So, an attornment. *Co. L. 274. b. 2 Co. 68. a. R. 9 Co. 85. b. 1 Rol. 412. l. 45.*

So, a manumission of a villein. *Co. L. 274. b.*

But a condition cannot be released upon condition; for the condition annexed to the release shall be void, and the release shall be good. *Co. L. 274. b.*

(A 9.) How it shall be annexed.

The condition may be contained in the same deed.

Or indorsed upon the obligation or deed. *1 Rol. 413. l. 10.*

Or may be contained in another deed executed upon the same day. *1 Rol. 414. l. 20.*

So, a condition to defeat an estate may be annexed to the reservation of the rent, explaining the manner of payment. *R. Mod. 52.*

But if a disseisor release his right, and the disseisor by his deed at a subsequent day, grant, that the release shall be upon such a condition, the condition is void. *1 Rol. 414. l. 15.*

(A 10.) Who shall be bound by a Condition.

If an exprefs condition be annexed to an estate made to a *feme covert*, she shall be bound by it. *1 Rol. 421. l. 32. Vide post. (F).*

Or, to an estate made to an infant. *1 Rol. 421. l. 35.*

Or, to an estate made to any one of full age, who dies; his heir within age shall be bound by the condition. *R. 1. Rol. 421. l. 37.*

So, a condition in law, annexed to an office which requires skill or confidence, binds an infant and *feme covert*. *Co. L. 233. b.*

So, if an infant or *feme covert* does waste, it shall be a forfeiture. *Ibid.*

But if an infant or *feme covert* aliens in *mortmain*, it is not an absolute forfeiture. *Ibid.*

(B) Condition Precedent.

(B 1.) What shall be.

A CONDITION is precedent, or subsequent.

[There are no technical words to distinguish conditions precedent and subsequent; but the same words may indifferently make either, according to the intent of the person who creates it. *Robinson v. Comyns, H. 9 G. 2. C. T. T. 164. Vide 1 Term Rep. 645.*]

A condition precedent is such as ought to be performed before the estate vests, or the grant or gift takes effect.

As, if a man leases land for years, upon condition, *that the lessee, if he pays such a sum within two years, shall have the fee.* *Co. L. 216. a.*

If a man binds himself, *if he recovers twenty acres, to give a moiety to B.* if he recovers only ten acres, he is not bound to give any part. *1 Rol. 433. l. 21.*

If a man grants a sum for the doing of such an act, or, to such an one if he does it: this is a condition precedent, for the duty commences by the performance. *1 Rol. 414. l. 25 ad 35.*

So, if he acknowledges that he owes so much, and then binds himself in a penalty for the payment. *R. 1 Rol. 414. l. 35.*

If a submission to an award be *ita quod fiat*, &c. this is a condition precedent. *1 Rol. 416. l. 3. [Vide 2 Ld. Raym. 766.]*

If a devise be of the residue *after debts and legacies paid*; it is a condition precedent that those be first paid. *R. 1 Rol. 415. l. 35.*

Or of land, *that it shall be sold, if the personal estate be not sufficient for the payment of debts.* *R. Jon. 328.*

If a settlement be in trust, *that if A. marries B. after the age of sixteen years, and they have issue male, the estate shall be to A. and B. for their lives*; it shall be a condition precedent, that there be the marriage and issue male, before the estate vests. *R. Ca. Parl. 84.*

So, if a condition be annexed to a thing, which cannot be done but on a condition precedent, it shall be construed to be a condition precedent: as, if a man releases an obligation to *A. provided that B. pays him 20 l. at a future day.* *R. 1 Rol. 415. l. 15.*

So, in all personal contracts, the word *pro* makes a condition precedent: as, if I contract to sell a horse for 10 l. *Hob. 41.*

[The word *pro* will be either a condition precedent or subsequent, as will best answer the intent of the parties. *1 Str. 571.*]

[Where there is no mutual remedy, it shall be a condition precedent, as where the defendant, by *deed-poll* promised to accept of the plaintiff 500 l. stock, so soon as the receipts should be delivered out by the company, and would pay for the same 950 l. on a particular day; the defendant being the only party covenanting, and consequently, there being no remedy to compel the plaintiff to deliver the receipts; plaintiff must shew either a delivery or tender and refusal before he can bring his action for the money. *Str. 569.*]

[As where plaintiff covenanted to transfer stock, and the defendant to accept and pay for it, the plaintiff need not shew a transfer or tender. *Str. 535. Vide 1 Ld. Ray. 665. Vide etiam Doug. 689.*]

Otherwise, generally where there are mutual covenants. *R. 1 Sand. 320. R. 2 Sand. 156.*

Yet, if *A.* covenants to assure land, and *B.* covenants for the performance of it to pay; he is not bound to pay till the land be assured. *2 Sand. 156.*

[On a contract to transfer stock on payment of money, the payment of the money is not a condition precedent, but a concurrent act; if the transferrer does not attend, the plaintiff need not shew he had the money ready; if he attends, the plaintiff must lay down the money, tho' not so as to part with it till transfer. *Merret v. Rane, T. 7 G. Str. 458. Vide Doug. 684.*]

[In *consideration*, that the plaintiff, at the request of the defendant would execute to the defendant a general release, the defendant promised to pay: this is a condition precedent, to *give* or *tender* a release executed. *2 Bur. 900.*]

[A policy of insurance against fire under seal, refers to certain proposals distinct from the deed, which declares that all persons insured sustaining any loss by fire, shall, among other things, produce a certificate under the hands of the minister and churchwardens, and some respectable householders of the parish, importing that they were acquainted with the character and circumstances of the persons insured, and know or verily believe that the loss really happened by misfortune,

misfortune, without any fraud or evil practice. 2. Whether the production of a certificate, *so* signed, be a condition precedent to a recovery against the insurers on the policy? Or whether it be not sufficient to shew that a certificate was produced and signed by many reputable householders of the parish, and that the minister and churchwardens being applied to, *without any reasonable or probable cause wrongfully and unjustly refused to sign it?* *Sembl.* that a certificate signed in the latter mode would be sufficient, *Wood v. Worsley*. C. P. M. 36 Geo. 3. 2 H. Bl. 574. [Such a condition is a condition precedent, and must be *strictly* complied with to entitle the insured to recover. *Oldman v. Bewicke*, C. P. M. 26 Geo. 3. 2 H. Bl. 577. in note. *Worsley v. Wood*, in Error, B. R. T. 36 Geo. 3. 6 T. R. 710.]

[In a lease for seven years containing the usual covenants that the lessee should pay the rent, keep the premises in repair, &c. there was a proviso that the lessee might determine the term at the end of the first three or five years, giving six months previous notice, and that then, from and after expiration of such notice, and payment of all rents and duties to be paid by the lessee, and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void. It was ruled, that the payment of rent and performance of the other covenants are conditions precedent to the lessee's determining the term at the end of the first three years, and that his merely giving six months notice expiring with the first three years, was insufficient for that purpose. *Porter v. Shephard*, B. R. E. 36 Geo. 3. 6 T. R. 665.]

[If a devise be made of land to trustees to pay 20*l.* of the rents and profits to the testator's daughter, and the rest to her husband, and the whole rents and profits to the husband after testator's death, and *in case* the daughter should survive the husband, *then* the land to the use of the daughter for life, and after her death to the use of her son in tail, then to the heirs of the body of the husband: the daughter's surviving her husband is a condition precedent to the limitations over, and if she die before him, they shall not take effect. *Doug.* 75.]

[But, if the devise be to the testator's son for life, remainders in tail to his first and other sons, &c. by any *future* wife; but if he should marry any person related to his present wife, *in such case*, to go over to the testator's brother.—The event of the son's marrying a second wife related to the first is not a condition precedent; and on his death without marrying again, the estate vests in the children of the testator's brother, and does not descend to testator's heir at law. *Id.* 63.]

[One having an estate for life, remainder to *H.* in tail, devised that estate together with his own estate to trustees, to the use of *H.* for life, but provided that his own estate should not be conveyed, unless *H.* within 6 months should suffer a recovery to bar the remainders in a will by which testator had the estate for life, and in default to other uses. *H.* did acts of ownership, but never suffered a recovery. The testator's own estate never vested in *H.* because the suffering of the recovery was a condition precedent. 2 *Brown*, 67. *Vide Ambler*, 533.]

Vide Chancery, (2 Q 8.)—*Pleader*, (C 51.)

(B 2.) Condition to have a Fee, when good.

Land may be conveyed for a less estate, upon condition that if such a thing be performed, the grantee shall have a fee. *Co. L. 216.*

And such a condition precedent may be annexed to an estate-tail, which does not merge by the accruing of the fee, as well as to an estate for life, or years. *R. 8 Co. 75. a. 76. a. Ld. Stafford.*

And to rents, advowsons, &c. which lie in grant, as well as to an estate in land. *R. 8 Co. 75. a.*

But where such condition is annexed, there ought to be a particular estate granted, as a foundation upon which the fee shall accrue: as an estate-tail, for life or for years. *8 Co. 75.*

And the particular estate ought to be permanent; and therefore, to an estate at will such condition to have a fee cannot be annexed. *Per Coke, 8 Co. 75. a.*

So, if the particular estate granted be for years, but subject to be destroyed upon a contingency, it is not sufficient: as, if an estate for years be granted, upon condition, *that if he pay ten shillings within a year, the lessee shall have it for life, and if he pay twenty shillings after the year, he shall have the fee*; the condition to have the fee is not good; for if he pays the ten shillings, by the accruing of the estate for life, the term for years was merged. *Ibid.*

And the estate for life, being only possible and contingent, is not sufficient to support the condition to have a fee. *Ibid.*

And as the particular estate ought to be permanent, the privity of the estate ought to continue; for, if the grantee or lessee assigns, the estate in fee cannot accrue. *8 Co. 75. b.*

Or, if the grantee accepts a release for life, or in tail from the lessor. *Ibid.*

Or, if a particular estate be granted to two, and they make partition. *8 Co. 75. b. 76.*

So, if the grantee assigns, tho' afterwards he takes back the same estate. *8 Co. 75. b.*

Otherwise, if one lessee dies; for then the privity does not determine. *8 Co. 75.*

Or, if the lessee leases for a less term. *Ibid.*

Or, leases for the whole term, upon a condition, and enters for the condition broken. *Ibid.*

Or, if the lessor dies, or aliens the reversion. *Ibid.*

The particular estate and the condition to have a fee ought to be granted by the same deed, otherwise the fee will never accrue. *8 Co. 77. a.*

Or, by different deeds executed at the same time. *Ibid.*

But tho' the condition be precedent to the accruing of the fee, it does not determine the particular estate to which it is annexed; as, if a lease be made to *A.*, *B.*, and *C.*, and if *A.* dies living *B.*, then to *B.* and his heirs; tho' this contingency happens, the estate of *C.* is not determined. *Pol. 76.*

(B 3.) At what time an Estate shall vest upon a Condition precedent.

If a lease be for years, with a condition, that if the lessee does such a thing, he shall have the fee, and livery be made to the lessee; he has the fee immediately, tho', by the words, the performance ought

to precede the estate ; for the livery cannot expect *in futuro*. *Co. L. 217.*

But, generally, the estate does not vest till the condition precedent performed : and therefore, if a personal thing be granted upon a condition precedent ; the property does not vest till the condition performed.

[So, if a devise be that if *A.* and *B.* shall marry into the families of *C.* or *D.* and either of them have a son, then the estate to go to that son ; if they shall not marry, then to *E.* They marry, but not into the favoured families : *E.* has no claim till after their deaths, for the condition as to him is precedent, and they have their whole lives to perform it in. *1 Brown, 55.*]

So, if a release be of an obligation, or personal action, upon a condition precedent ; the action, &c. is not suspended till the condition performed. *R. 1 Rol. 412. l. 35.*

So, if an advowson, or other thing which lies in grant, be granted for years, with condition to have a fee ; the fee does not vest till the condition performed. *Co. L. 217. b.*

So, if the king grants for years, with condition to have the fee ; for there no livery is necessary. *Ibid.*

So, if a common person grants for years, and by a subsequent deed gives the fee, upon a condition precedent, to the lessee ; for then there is no need of livery. *Ibid.*

Or, if he grants for life with such a condition, and makes livery ; for then the livery has effect, and does not expect. *Co. L. 217. b.*

After the condition performed, the estate in fee vests without other solemnity ; otherwise it could never vest. *8 Co. 76. b.*

Tho' it be in the case of the king. *Ibid.*

(C) Condition subsequent.

What shall be.

A CONDITION subsequent is such as defeats an estate by some subsequent act.

As, a fine be to the use of another, or a feoffment, &c. upon condition, that if such an act be afterwards performed, the estate shall be void.

So, in every case, where the intent appears, that the estate shall be vested till the condition be performed, it shall be a condition subsequent : as, if a fine be to *A.* in fee if *B.* does not pay so much before Michaelmas, and if he pays, then to *B.* in fee ; for it appears that *A.* shall have the land till *B.* pays. *R. 1 Rol. 415. l. 45.*

So, a devise to *A.* if he lives till his age of twenty-one years, upon condition, that if he dies before, it shall go to *B.* and his heirs, shall be a condition subsequent ; for the intent appears, that *A.* shall take immediately. *R. 3 Lev. 132.*

A devise of a term to *A.* and that if his wife permits his enjoyment for three years she shall have his goods as executrix, but if she disturbs him, his son shall be executor ; the wife may sue as executrix within the three years, for the words, that the son shall upon disturbance, shew the intent, that the wife shall be executrix in the meantime. *R. Cro. El. 219.*

(D) What Conditions are not good.

(D 1.) If they are impossible.

IF a condition precedent to a feoffment, &c. be impossible at the time, or afterwards becomes impossible, the feoffment shall be of no effect: for, till performance, the estate cannot vest. *Co. L. 206. 1 Rol. 420. l. 35.*

If a condition subsequent to a feoffment be impossible at the time of the making, the estate of the feoffee is absolute, and the condition shall be void. *Co. L. 206. a. 1 Rol. 420. l. 30.*

So, if the condition to an obligation, recognizance, &c. be impossible at the making, the obligation is single. *Co. L. 206. a. 1 Rol. 420. l. 30. R. 3 Lev. 74.*

So, if a condition to a feoffment, &c. be possible at the making, and afterwards becomes impossible by the act of God, the estate of the feoffee is absolute; for, being vested, it cannot be divested without the performance of the condition, which was for the benefit of the feoffee. *Co. L. 206. a. 219. a. 1 Rol. 449. l. 50. R. 1 Sal. 170.*

So, if it becomes impossible by the act of the feoffor himself. *Co. L. 206. b.*

But if the condition of an obligation, recognizance, &c. was possible at the making, and afterwards becomes impossible by the act of God, of the law, or of the obligee himself, the obligation shall be saved. *Co. L. 206. a. 1 Rol. 449. l. 35. 451. l. 40. 45. Vide post. (D 7.)*

So, if a condition be in the disjunctive, and gives liberty to do one thing or another at his election, and the one part becomes impossible: as, *to enfeoff A. or make him his executor*, and he dies before the obligee. *R. M. 357. Cro. El. 277. Per three J. Cro. El. 398. 5 Co. 22. a. Popb. 98. 1 Rol. 450. l. 35. R. Jon. 171. 2. 181. 2 Mod. 202, 203. Vide post. (K 1, &c.)*

Otherwise, if the disjunctive does not give liberty to do the one thing or the other. *1 Rol. 450. l. 50. 451. l. 5. Semb. 3 Mod. 232.*

And if a man covenants, or promises to do a certain thing at a certain time, and it becomes impossible by the act of God, he shall not be excused. *1 Rol. 450. l. 20. Vide Action upon the Case upon Assumpsit (G).*

(D 2.) *What shall be said impossible.*] If a condition be to do a thing which by no means can be done, it shall be said to be an impossible condition: as, *to go from London to Rome in three hours.* *1 Rol. 240. l. 10.*

To assign a commission of bankrupts; for the commission cannot be assigned. *R. 1 Rol. 419. l. 50.*

But if the condition be improbable, and out of his power to do, yet it shall not be said to be impossible.

As, if the condition be, *that a married man shall marry such a woman*; for it is possible that his present wife may die before him, and the other woman. *1 Rol. 419. l. 45.*

That the pope shall be in London within a day. *1 Rol. 420. l. 8.*

That he will indemnify against B. upon an obligation by A. to C. tho' it does not appear that B. is concerned. *1 Rol. 420. l. 20.*

So, tho' it be out of human power: as, *that it shall rain to-morrow*; for it is possible. *1 Rol. 420. l. 5.*

(D 3.) If a Condition be contrary to Law ; in a Feoffment, Gift, &c.

So, if a condition precedent to a feoffment be illegal, or repugnant, the estate can never vest.

If a condition subsequent to a feoffment be to do a thing which is *malum in se*, the condition shall be void, and the estate remains absolute: as, a condition to commit murder, or robbery, &c. *Co. L. 206. b.*

So, if a condition upon a feoffment, &c. be to do a thing contrary to the obligation or rule of law: as, a feoffment upon condition, *that a daughter shall inherit, and not a son.* *1 Rol. 418. l. 42.*

(D 4.) Or repugnant.

(D 4.) *To the grant.*] So, if it be repugnant to a grant: as, a feoffment, &c. upon condition, *that he shall not take the profits*; the estate remains absolute, and the condition is void. *C. L. 206. b. 7 H. 6. 43. b.*

A warranty, upon condition, *that it be void.* *1 R. 419. l. 20.*

So, a general warranty, upon condition, *that he shall not have in value*: yet he may rebut, and then it is not wholly defeated; but he might rebut without the words, (*against all men,*) and therefore they are defeated. *1 Rol. 419. l. 25.*

So, a grant by a bishop rendering rent to him and his successors, and if it be not paid to the chapter in the vacation, *that it shall be void*: the condition is repugnant, and therefore void. *R. Mo. 52.*

So, a lease to A. upon condition, *that he shall not take the profits for two years.* *2 Leo. 132.*

Or, to A., B., and C. upon condition, *that if C. takes the profits during the lives of A. and B. his estate shall cease.* *Ibid.*

(D 5.) *To the estate.*] So, if a condition upon a feoffment be repugnant to the nature of the estate: as, a feoffment, upon condition, *that the feoffee shall not alien*; the estate is absolute, and the condition void. *Co. L. 206. b. 223. a.*

So, if a grant, release, confirmation, or devise in fee be made, upon such a condition. *Co. L. 223. a.*

So, if a term for years, or chattel real or personal be granted or assigned, upon such a condition. *Co. L. 223. a. Semb. cont. 223. b.*

So, a feoffment or gift in tail, upon condition, *that the wife shall not be endowed, or the husband shall not take by the curtesy*; the condition is void. *1 Rol. 418. l. 25. Co. L. 224. a.*

So, a gift in tail, upon a condition, *that the donee shall not levy a fine, or suffer a recovery, or make a lease within the stat. 32 H. 8.* the condition is void. *R. 6 Co. 41. 10 Co. 38. b.—Cont. as to the lease, Co. L. 123. b. Acc. as to the fine and recovery, Co. L. 224. a. Hob. 170. Vide infra.*

[So, a condition that if tenant in tail suffer a recovery to bar the remainders, he shall pay a sum of money to the remainder-man, is void as being repugnant to the estate. *Ambler, 379.*]

So, a condition to a gift in tail, *that the donee shall not be bound by a collateral warranty.* *10 Co. 39.*

Or, *that the donee after possibility shall be punished for waste.* *Ibid.*

Or, *that the donee shall not make a grant for his own life.* *6 Co. 43. a. Cont. Co. L. 223. b.*

Or, *that the donee shall not levy a fine within the stat. 4 H. 7.* *1 Rol. 418. l. 30. Otherwise of a fine at common law. Ibid. l. 35. Vide supra.*

So, a condition, *that the donee shall not effectually go to alter, &c.* for an attempt, without more, is not effectual; and if an act effectual is done, the estate is gone to another. *R. Jon. 59.*

So, a lease to *A.* and his assignees, upon condition, *that he shall not alien.* *Hob. 170.*

Or, *that he shall not use such a room, or part;* for it is not excepted. *Ibid.*

(D 6.) *What shall not be repugnant.*] But a feoffment, upon condition, *that the feoffee shall not alien to such a particular person*, is not repugnant; for his alienation is not totally restrained. *Lit. S. 361.*

Or, *that he shall not alien in mortmain.* *Co. L. 223. b.*

So, a condition to a feoffment before the *stat. quia emptores terrarum*, is good, *that he shall not alien, without licence.* *Co. L. 223. a.*

Or, by the lord, *that he shall not alien*, generally. *Semb. Co. L. 223. a.*

And now, since the *stat.* such a condition to a feoffment by the king is good; for he may reserve a tenure to himself. *Co. L. 222. a.*

A feoffment, upon condition, *that he shall not alien other land*, is good now. *Ibid.*

So, a condition to a gift in tail, *that he shall not alien in fee, or pur auter vie*, is not repugnant; for such alienation, without a recovery, will make a discontinuance. *Lit. S. 362. 1 Rol. 418. l. 35. 21 H. 7. 11. 6 Co. 41. b.*

So, if such condition be, where the gift is to *A.* in tail, remainder to him in fee. *R. 11 H. 7. 6. b.*

So, a feoffment to husband and wife, upon condition, *that they shall not alien*, restrains an alienation, except by fine. *Co. L. 224. a. 6 Co. 41. b.*

A feoffment to an infant, upon such condition, is good to restrain an alienation during his infancy. *Ibid.*

So, such a condition, in a feoffment to an ecclesiastical corporation, is good. *Co. L. 224. a.*

So, if a lease to commence at a future day be, upon condition to be void if the lessee dies before the commencement or before the end of term, it is not repugnant: *R. 1 Rol. 418. l. 50.*

[So, a condition in a lease for 21 years, that the landlord shall re-enter, on the tenant's committing any act of bankruptcy, on which a commission shall issue, is not repugnant. *2 Term Rep. 133.*]

(D 7.) If a Condition be contrary to Law; in Obligations, &c.

If a condition of an obligation be to do a thing which is *malum in se*, the condition and also the obligation is void: as, if an obligation be with condition *to kill another.* *Co. L. 266. b.*

To maintain, and use such a one as his wife, who is the wife of another. *R. Mo. 477.*

[Bond from *A.* to *B.* reciting they had agreed to live together, *A.* to maintain *B.* and leave her annuity of 60*l.* if he quits her, or she outlives him; if she leaves him, he is not to maintain her any longer, or leave the annuity; the bond is illegal and void; it is not *premium pudicitiae*, but *premium prostitutionis.* *Walker v. Perkins, M. 5 G. 3. 3 B. M. 1563.*]

So, if the condition be, *to enlarge him out of prison, or suffer his escape.* *R. Hob. 14. R. Hard. 464.*

So, if the condition becomes impossible by the act of God, of the law, or of the obligee, the obligation shall be saved. *R. Mo. 855. Vide ante, (D 1.)*

So, if the condition be to perform covenants which are void by statute, or by law. *Vide Covenant (F).*

[But condition to resign a benefice on request, generally is good; and the court will not suffer it to be argued. *Peele v Com. Carlol, M. 6 G. Str. 227. Turner v. Hawkins, T. 4 G. Fort. 351.*]

[So, bond with condition that if defendant hire *A.* as his servant in *B.* for such time as shall gain him settlement in *B.* and permit him to gain settlement there, or if *A.* gains settlement by defendant's assistance anywhere out of *C.* &c. is a good bond. *Whiting v. Punchard, P. 10 G. 3. 3 Wilf. 50.*]

[A bond given by a servant of the *African* company conditioned to take possession of the effects of persons dying intestate in one of their settlements on the coast of *Africa*, and sell the same and remit the produce to the company in *Europe*, to be by them delivered to the lawful administrator, is a legal bond. *The African Company v. Torrane, B. R. H. 36 Geo. 3. 6 T. R. 588.*]

[A bond given to an individual, conditioned to be void if the obligor (on the obligee's agreeing not to prosecute him) should remove certain public nuisances, and not erect any others of the same kind, is good in law. *Fallowes v. Taylor, B. R. H. 38 Geo. 3. 7 T. R. 475.*]

[If the condition of a bond be to render a person in execution, who has once been discharged, it is void. *Da Costa v. Davis, C. P. E. 38 Geo. 3. 1 Bos. & Pull. Rep. 242.*]

(D 8.) Otherwise, if contrary to a Maxim of Law, or repugnant.

But if the condition of an obligation, &c. be only to do a thing contrary to a maxim of law, or repugnant to the nature of the grant or of estate, the obligation is good; for he may do it, if he will forfeit his obligation.

As, if an obligation be, with condition *to make a feoffment to his wife*; tho' it cannot be by the rule of law, the obligation is good. *Co. L. 206. b.*

To do an act, which will be maintenance. *1 Rol. 417. l. 45.*

So, if an obligation be, *that the feoffee shall not take the profits of his estate.* *Co. L. 206. b.*

Or, *that the feoffee shall not alien.* *Ibid.*

So, if the condition of an obligation, &c. was impossible at the making, the obligation is single. *2 Leo. 189. 5 Lev. 74. Vide ante, (D 1.)*

So, if it be to perform covenants in an indenture, &c. which becomes void by rasure, &c. *1 Leo. 282.*

Yet, if the condition be part of the obligation, and incorporated with it, if that becomes impossible, the obligation shall be void; as, if the condition of a recognizance by bail be impossible. *1 Sal. 172.*

(E) Condition expounded.

When liberally.

THE words of a condition shall be liberally expounded to serve the intent of the parties; as, if the condition of an obligation be, *whereas A. will surrender a copyhold to B. if they so long live, then the obligation shall be void*; it shall be part of the condition, that A. make the surrender. R. 1 Rol. 409. l. 30.

So, a condition, *that if A. discharge a recognizance, and whereas he hath agreed to free the obligee from two bonds, the condition is, that if A. save him harmless from the said two bonds, then, &c.* it extends to the recognizance, as well as to the two bonds. R. 1 Rol. 409. l. 40.

If the heir confirms the grant of his father as to a walk in a forest, &c. and by the same indenture grants another walk, upon condition, *that he do not cut trees in aliqua parte præmissorum*; if he cuts in the part confirmed, it is within the condition. R. 1 Rol. 422. l. 20.

If a man promises, *that he will not discharge A. out of execution without the consent of B.* and afterwards he releases the execution, upon which B. recovers against him in *assumpsit*; an obligation by A. to indemnify him against all suits which may arise upon this release, extends to this *assumpsit*. R. 1 Rol. 422. l. 30. 431. l. 45. *Vide post.* (I).

If a condition be, *to assure lands discharged of all prior incumbrances, except a lease for years upon the antient rent*; if he assures, but before that, and after the condition, he makes a lease for years upon the antient rent, it is no breach. 1 Rol. 433. l. 30.

If a condition be, *to re-enter, if no distress be found*; this shall be expounded of a reasonable distress; and therefore if a lock't cupboard remains there, he may enter. R. 1 Rol. 428. l. 35.

To perform all articles in the indenture, does not extend to land excepted out of the lease, tho' it be mentioned in the indenture. R. 1 Rol. 431. l. 25.

If a condition be, *that if he dies without issue, he by his deed or will shall give land to B.* it shall be understood, that he shall make such settlement or disposition in his lifetime, which shall take effect, if he dies without issue. R. per three J. Jon. 180.

If a condition be, *to re-pay 500 l. of the portion, if his wife dies within two years after the marriage without issue*; if she has issue, he is not bound to repay, tho' the wife and also the issue die within two years. R. 1 Sid. 102.

If a condition be, *that the lessee shall not assign without the assent of the lessor*; he cannot give, grant, or sell, for those are assignments. Mo. 11.

If a condition be, *to deliver so many shoes to A. a common carrier, for the use of the obligee*; a delivery to the porter of A. is sufficient, for the master shall be bound by it. R. 2 Mod. 309.

If a condition be, *that there is no incumbrance but an estate for life*; an estate for the life of B. where his wife by the custom has free-bench, is not a breach. 2 Ver. 45.

If a condition be in a lease by two lessors, *that the lessee shall enjoy without disturbance or incumbrance made by them*; a lease by one lessor will be a breach. R. Lat. 161.

If a condition be, *that the lessee shall enjoy*; this shall not be extended

tended to tortious acts: and therefore, if he be disturbed without title, it is not a breach of the condition. *R. 1 Rol. 430. l. 35.*

So, tho' the words are express, *that he shall enjoy without the interruption of any.* *Semb. cont. 3 Leo. 44. [Com. Rep. 230.]*

So, in covenant. *R. Jon. 197.*

[A covenant in a conveyance of lands in *America* during the time of the rebellion in that country, that the grantor had a legal title, and that the grantee might peaceably enjoy, &c. without the let, interruption, &c. of the grantor and his heirs, or of any other person whomsoever, is not broken by the States of *America* seizing the lands as forfeited for an act done previously to the conveyance, notwithstanding the subsequent acknowledgment of their independence by this country. *Dudley v. Folliott, B. R. E. 30 Geo. 3. 3 T. R. 584.*]

[Such a covenant does not extend to the acts of wrong-doers, but only to persons claiming by a legal title. *Ibid.*]

If a condition be, *to save harmless concerning the buying of goods at such a price*; it extends to the title of the goods, not to the price. *R. Al. 95.*

If a condition be, *that he shall not molest A. in his lands or goods upon any account*; for it shall be intended of a tortious molestation. *R. Cro. El. 795.*

So, a condition shall not be construed to extend to things of common right. *R. 1 Rol. 434. l. 20.*

As, if a condition be, *that A. shall enjoy such land immediately upon his death*; and at his death the land was sown with corn, and his executor takes the emblements; the condition does not extend to it. *R. 4 Leo. 1.*

[If a man binds himself by bond to leave his children jointly 200 *l.* and leaves four children, and by will gives the eldest son land worth more than 50 *l.* and to the other three 50 *l.* a-piece, payable at twenty-one; this is not performance. *Taylor v. Bird, M. 24 G. 2. 1 Wils. 280.*]

(F) To what it extends.

IF a devise be to *A.* in tail, remainder to *B.* in tail, upon condition, *that he, they, or any of them shall not discontinue, &c.* the condition extends only to the remainder. *1 Rol. 422. l. 5. R. 5 Co. 68. Vide ante, (A 10.)*

A gift to *A.* in tail, remainder to him in fee, upon condition, *that he shall not alien*, extends only to the estate-tail; for it is repugnant to the fee. *Co. L. 224. a.*

So, a lease, upon condition, *that the lessee or his assigns shall not alien, unless to his brother*; if the lessee assigns his term to his brother, he shall not be restrained by the condition. *R. 1 Rol. 422. l. 10. Vide post. (Q.)*

That the lessee shall not sell, &c. without the assent of the lessor; the executor of the lessee, after the death of the lessor, may sell. *Dy. 65. b. Mo. 11.*

(G) Condition performed.

(G 1.) By whom it may be.

For and against whom **I**F a feoffment be upon condition, *that the feoffor pay so much at such a day, and before the*
covenant lies.]

the day he dies, the heir may pay it; for he has an interest in the land, and the feoffee has the same advantage if the payment be by the heir, as if it were by the feoffor himself. *Lit. S. 334. Vide Covenant, (B 1, &c. — C 1, &c.)*

So, a fine to the use of A. in fee, but if B. pays so much before Michaelmas to A. for life, and to B. in fee, B. dies before Michaelmas; his heir may pay. *Dub. 1 Rol. 420. l. 45.*

If a devise be to a wife for life, and after to A. his son in fee, with a proviso, that if B. pays 500 l. to A. within three months after the death of the wife, B. shall have it to him and his heirs; B. dies before the wife; his heir may pay. *R. Eq. Abr. 107. Marks v. Marks, M. 5 G. Str. 129.*

So, an executor or administrator may pay. *Lit. S. 337. Co. Lit. 209. a.*

Or the ordinary, if there be no executor or administrator. *Co. L. 209. a.*

So, if the heir be within age, his guardian may pay in respect of his interest. *Co. L. 206. b.*

So, every one, who has an interest in the condition, or in the land, may perform the condition; as, if a feoffee, upon condition to pay at Michaelmas, enfeoffs another before Michaelmas; the second feoffee may pay. *Lit. S. 336.*

So, the feoffee himself, after his feoffment to the other, may pay. *Ibid.*

So, a servant by the command of the feoffee may pay. *1 Rol. 421. l. 47.*

So, if an heir be an idiot, a stranger may pay for him. *Co. L. 206. b.*

So, if a stranger, in any case, pay in the name, and without the privity of the feoffor or his heir, and the feoffee accept it; it will be a good performance. *Co. L. 207. a.*

So, if two be enfeoffed, upon condition to re-enfeoff him for life, remainder in fee to B. and one re-enfeoffs him; it shall be good for a moiety, tho' the condition be entire; for, by his acceptance, the feoffor dispensed with the condition. *Dy. 69, 70.*

But if a stranger of his own head offers to perform a condition, the feoffor need not accept it. *Lit. S. 334.*

So, if a condition be, that the feoffor pay, without limiting a time for payment; the heir, &c. cannot pay, for the feoffor had time only during his life. *Lit. S. 337.*

(G 2.) To whom it ought to be performed.

If a condition be, to pay, on such a day, money to A. his heirs or assigns; it may be paid to any one named in the condition: and therefore, the money may be paid to the heir of the feoffee, after his death; tho' he has an executor to whom the money belongs. *R. 5 Co. 96. Vide Chancery, (4 A 9.)*

So, it may be paid to the heir, after assignment by the feoffee. *R. 5 Co. 96. 1 Rol. 421. l. 5.*

So, if a condition be, to convey to A. his heirs and assigns; and A. dies; the conveyance shall be to his heir. *Semb. Jon. 181.*

So, if the feoffee assigns all his estate, the payment may be to the feoffee

feoffee himself, or to his assignee; for the words of the condition give him an election to pay to the one or the other. *Co. L. 210. a.*

And after the death of the feoffee, the payment may be to the heir, or assignee. *Ibid.*

So, if a condition be, *to pay to A. his heirs or executors*; the payment may be to the heir or executor, at the election of the feoffor. *Co. L. 210. a.*

If it be, *to pay to the feoffor, his heirs or assigns*; it may be to the heir, or executor; for he is an assignee in law, and there cannot be any other assignee of a bare condition. *Co. L. 210. a. 5 Co. 97. a.*

If a condition be, *to lease to A. or his assigns*; he ought to lease to those whom *A.* names; for he cannot have other assigns. *R. 1 Rol. 421. l. 20.*

If a condition be, *that he pay to the feoffee*, without more, *on such a day*, and he dies before the day; the payment ought to be only to the executor or administrator, and cannot be to the heir. *Lit. S. 339.*

So, the payment may be to any deputed by the feoffee. *1 Rol. 421. l. 50.*

If a condition be, *that he pay to the feoffee, his executors or assigns*; payment to any executor is sufficient. *Per Manw. 3 Leo. 103.*

And it is safer to pay to an executor, tho' within age, than to an administrator *durante minore atate*. *R. 3 Leo. 103.*

But, if a condition name any to whom the payment shall be, it cannot be paid to another: as, a feoffment upon condition, *that he pay to the feoffee or his heirs*; the payment ought to be to the heir, and cannot be to the executor. *Lit. S. 339. Co. L. 210. a. R. 5 Co. 96. b. 97. a.*

So, it cannot be paid to an assignee; for he is not named. *R. 5 Co. 96. b. 1 Rol. 421. l. 10.*

So, if a condition be, *to pay to the feoffee, his heirs or assigns*, and the feoffee grants for life or years; the payment cannot be to the grantee; for no assignee is intended, who has not an assignment of all his interest, *viz.* in fee, in tail, or for life with remainder in fee. *R. 5 Co. 97. a.*

So, if the feoffee makes his executor, the payment cannot be to him; for an assignee in law shall not be intended, where there may be an assignee in fact. *R. 5 Co. 97. a. Co. L. 210. a.*

If a condition be, *to pay to such whom the obligee shall name by his will*, and he does not name any; the payment shall not be to his executor, for there ought to be an express nominee. *R. 1 Rol. 422. l. 25.*

(G 3.) At what Time.

(G 3.) *When he has time during his life. Tho' there be a request.]* If a condition upon a feoffment, obligation, &c. be to do a single act, or labour, which concerns himself only; he shall have time to do it during his life. *Co. L. 208, 9.*

And shall not be bound to do it upon request. *Co. L. 209. a.*

As, if a feoffment, obligation, &c. be upon condition, *that the feoffee, obligee, &c. go to Rome, Jerusalem, &c.* the feoffee has time to go, during his life. *Ibid.*

Or, *that a stranger go to Rome, &c.* *Ibid.*

So,

So, if a condition be to do an act, without limiting any time; he who has benefit by it may do it at what time he pleases: as, if a condition of a feoffment be, *that upon payment of 10 l. the feoffor may re-enter*; he may pay it when he pleases. *Pl. Com. 16. a.*

(G 4.) *When he has time during his life. Unless where hastened by request.*] If a condition be to do a local thing to the feoffor or obligee himself, he has time during life, unless he be hastened by request; as, if a feoffment or obligation be upon condition, *that he re-ensfeoff the feoffor or obligee.* *Co. L. 208. b. 1 Rol. 438. l. 15. 40. Co. L. 219. a. 220. a.*

So, if it be, *that he re-ensfeoff the feoffor, and a stranger.* *Co. L. 219. b.*

Or, *re-grant to the feoffor in tail, remainder to a stranger.* *Ibid.*

So, if a devise be to *A.* upon condition, *that she marry B.* time shall be allowed to *A.* to marry at any time during her life. *Per Holt, Skin. 320.*

So, if a devise be upon condition, *that A. marry him before her age of 21 years*, and *B.* dies before such age; *A.* shall have the land till her age of 21 years. *Ibid.*

(G 5.) *When to be performed immediately.*] But where a condition is to do a transitory thing without limiting any time, it ought to be done immediately, *viz.* in convenient time; as, an obligation to pay money, to deliver charters, &c. *Co. L. 208. a. 1 Rol. 436. l. 15 to 35.*

An obligation to deliver up an obligation in which *A.* and *B.* are bound. *R. 6 Co. 30. b.*

A devise upon condition to pay debts; they ought to be paid in convenient time. *1 Rol. 437. l. 20.*

Or, to sell for payment of debts. *1 Rol. 437. l. 25.*

To find security for payment. *R. 1 Rol. 438. l. 25.*

If a man be bound to make further assurance, &c. he ought to execute it immediately when required, without taking time to advise with counsel. *1 Rol. 440. l. 5. 15. 441. l. 30. 45. Per two J. Barkley cont. Jon. 314. Vide post. (H).*

So, if a condition be to do a local thing, which may be done in the absence, and without the concurrence of the obligee, it shall be performed immediately: as, an obligation, *that he acknowledge satisfaction upon record in B. R.* *Co. L. 208. b. 1 Rol. 436. l. 30.*

So, if a condition be to do a thing transitory or local, to a stranger: as, to pay money to a stranger. *Co. L. 208. b. 1 Rol. 437. l. 15. 438. l. 5.*

To ensfeoff a stranger; he ought to do it immediately, for otherwise the stranger will lose the profits in the mean time. *Co. L. 208. b. 1 Rol. 439. l. 30.*

Otherwise, if the king has land upon such condition. *Dy. 139.*

Or, if it be, to the stranger in tail, remainder to the feoffor. *1 Rol. 438 l. 22. Cont. Co. L. 219. b.*

So, if a condition be to do a local thing to the feoffor, or obligee himself, it ought to be done immediately, where the intent of the parties will be otherwise frustrated: as, an obligation to grant an annuity to the obligee, for his life, to be paid annually at Easter; it ought to be

be granted before *Easter*, otherwise it cannot be paid annually at *Easter* during his life. *Co. L. 208. b. 1 Rol. 439. l. 15.*

If *A.* promises to sell a lease of tithes made to *B.* for his life, and by him assigned to *A.* and to pay the money raised by the sale, or otherwise to re deliver the assignment; he ought to do it in convenient time, and has not time to sell during his life; for then perhaps by the death of *A.* the lease will expire. *R. 1 Rol. 436. l. 40.*

So, a promise to procure the king's grant, of a ward, shall be done in convenient time; for otherwise the profits in the mean time will be lost. *R. 1 Rol. 437. l. 40.*

So, if a feoffment be made, upon condition to give back the advowson to the feoffor for his life; it ought to be given back before an avoidance happens. *R. 2 Co. 78. b. Co. L. 222. b.*

If a covenant be to make a lease to *B.* who shall pay 20 *l.* as a fine; *B.* ought to request the lease in a convenient time. *R. Bridg. 41.*

But where a condition is to be performed immediately, he shall have a reasonable time to perform it, according to the nature of the thing to be done. *Vide post. (H). 1 Rol. 449. l. 12.*

So, if it be to be performed upon demand. *1 Rol. 449. l. 12. 443. l. 17.*

But if he refuses upon demand, it is broken, tho' he performs it within a reasonable time afterwards. *1 Rol. 449. l. 15.*

If a condition be to make an obligation immediately by the advice of *B.* he shall have a reasonable time to obtain the advice of *B.* *1 Rol. 443. l. 15.*

(G 6.) *How a condition shall be performed where the time is limited. What shall be the time intended.]* If upon a writ returnable *die Luna prox. post Cras. Trin.* an arrest be on the last day, and an obligation of the same date, to appear *die Luna prox. post Cras. Trin.* he ought to appear the same day. *Dub. 1 Rol. 444. l. 30.*

If a condition be to pay at *Mich.* without more; he ought to pay at the next *Mich.* *R. 1 Rol. 444. l. 50.*

If a condition be, to pay *A. D. 1599, upon the 12th of October next after date*; it shall be paid the 12th of *October, anno 1599*, tho' that be not the *October* next after date: for the intent appears, that it be paid *anno 1599*, and the subsequent words shall be construed to stand with the precedent; or if they cannot, they shall be void. *R. 1 Rol. 444. l. 40.*

If an obligation, dated 17th *November, 12 Jac. be, upon condition, to pay the 21st November ensuing 5 l. and 5 l. more on the 20th of December next after*; the first 5 *l.* shall be paid on the 21st of *November, 12 Jac.* for, *ensuing*, refers to the day, not to the month. *R. 1 Rol. 442. l. 20.*

If a condition be, to pay when *A. comes to his house 10 s. and 10 s. at Mich. and 10 s. at St. Andrew then next*; the payment of the latter sums ought to be at the next *Mich. and St. Andrew*; and not at those feasts after *A. comes to his house.* *1 Rol. 442. l. 25.*

If a condition be, to pay *citra, infra, vel ante festum*; it ought to be paid before the feast-day. *1 Rol. 442. l. 30.*

But if it be *in festo*, it ought to be paid upon the feast-day. *1 Rol. 442 l. 35.*

If

If a condition be, *to pay within forty days after a ship returns from her voyage to the port of D. or to another port where the goods are unladen*, the ship returns to the port of P. and there unloads; payment ought to be in forty days after the arrival, and not after the unloading: for that is but the description of the other port. *R. 1 Rol. 442. l. 40.*

[In debt on bond, the condition whereof reciting, "that a marriage was intended between A. and B. but at B.'s request to be deferred to her father's death; that A. and B. had mutually engaged not to intermarry but with each other; in consideration thereof, and for provision for A. if said marriage should not take effect, and that B. should intermarry with any other person, or die before the marriage, or refuse to marry A. on her father's death, B. had agreed that A. in either of the cases aforesaid should have 1200 l. of her fortune, and 5 l. per cent. interest from the date; now, if B. within a month of her intermarriage with any person but A. or within a month after her father's death, pay A. 1200 l. and 5 l. per cent. interest from the date, or her heirs, &c. within a month of her death pay A. 1200 l. then, &c." and B. afterwards marries another man in her father's lifetime, the bond is forfeited, and the money then payable, for the law will supply the words, *which shall first happen.* *Semb. Box v. Day, P. 17 G. 2. Wilf. 59.*]

(G 7.) *It may be performed before the day limited.*] If a condition be to pay money at such a day, it is sufficient if it be paid before the day, if the party accepts it: for that amounts to payment upon the day. *R. 1 Rol. 440. l. 30. 35. 473. l. 30. Co. L. 212. b.*

So, if it be to enfeoff such a one at a future day; it is sufficient if he enfeoff before the day. *1 Rol. 440. l. 40.*

Or, to enfeoff after the death of A. and he enfeoffs in his lifetime. *1 Rol. 440. l. 45.*

If it be to pay at or before such a day; he may pay at any time before, if he comes to the obligee, or meets him at the place appointed for payment. *R. Cro. El. 14.*

But payment before the day will not give a collateral advantage: and therefore, if a condition be, *upon payment of the 1st of May to re-enter*; if he pays before, he cannot re-enter till the 1st of May. *R. 1 Rol. 473. l. 30.*

(G 8.) *Or at the last part of the day.*] So, it is sufficient, if it be performed at the last part of the time limited: as, if the parliament enacts, that A. shall be convicted, *if he does not surrender himself within a quarter of a year*; it is sufficient, that he be surrendered on the last day of the quarter. *1 Rol. 442. l. 15.*

If a condition of an obligation be *to pay at or before 29th Sept. next*; a tender shall not be good without notice, unless it be upon the last day, *viz. 29th Sept.* *R. Cro. El. 14.*

And a tender may be the last instant of the day. *Adm. Mo. 122.*

An obligee, &c. to whom a condition is to be performed, need not attend the whole day. *Vide 1 Rol. 443. l. 7.*

(G 9.) In what Place it shall be performed.

If a condition of an obligation be to pay money to the obligee, at a day

day certain, without limiting any place ; the obligor is to seek out the obligee if he be within the realm. *Lit. S. 340.*

So, if a feoffment be upon such condition ; for it is a sum in gross, and collateral to the land. *Lit. S. 340. 1 Rol. 445. l. 30 ad 40.*

So, if a condition be, that a stranger shall shew a deed to his counsel upon request ; after request made, the stranger ought to seek out his counsel. *1 Rol. 443. l. 35.*

But if a condition be, to deliver a weighty thing, as corn, timber, &c. the obligor, before the day, ought to inquire where the obligee will appoint the delivery. *Co. L. 210. b. 4 Leo. 46.*

If a condition be to pay rent ; it is sufficient, that it be tendred, or paid, upon the land. *Co. L. 210. b.*

And it may be tendred upon the land, tho' he be bound by covenant to pay. *1 Rol. 443. l. 52.*

Or, bound under a penalty to pay. *1 Rol. 444. l. 2.*

So, if a condition be to pay, &c. at a place certain, without limiting any certain time ; the party ought to give notice to the obligee of the time when he will pay. *Co. L. 211. a. 8 Co. 92. b. 1 Rol. 449. l. 5.*

Or, if he meets the obligee or feoffee at the place at any time, he may pay. *Co. L. 211. a.*

Or, if the obligee receives the money at another place, it is sufficient, tho' he need not. *Co. L. 212.*

So, if a condition be, that a stranger make a feoffment, or do another act to a stranger at such a day ; he who is to make the feoffment ought to give notice to the feoffee, and request him to be upon the land. *Co. L. 211. a.*

If a condition be to do an act at such a place upon request, the request may be in any place : as, to deliver at *Rotterdam super requisitionem de eodem* : the request in any other place, to deliver there, is good. *R. 1 Rol. 443. l. 20.*

If a place certain be limited for payment, he is not bound to pay at another place. *1 Rol. 445. l. 52. 444. l. 7.*

Neither need the other accept it in another place. *1 Rol. 446. l. 5. 10. 444. l. 10. Lit. S. 343.*

But acceptance at another place is sufficient. *Lit. S. 343.*

(G 10.) How a Condition shall be performed.

(G 10.) *All incidents.*] If a condition be to do a thing ; he ought to do all that which depends upon the performance. *1 Rol. 422. l. 45.* How performance shall be pleaded, *vide in Pleader, (C 58, &c.)*

As, if a condition be *to stand to an award concerning a partition* ; if it awards a partition, and that he levy a fine for confirmation, he ought to levy the fine ; for it depends upon the partition, and enforces it. *1 Rol. 433. l. 47.*

(G 11.) *Strictly performed.*] So, he ought to perform it strictly ; as, if a condition be *to enter a retraxit*, and he discontinues ; it is not a performance. *1 Rol. 426. l. 32.*

To appear at the suit of such a one in B. R. and he appears there the same term in another suit ; tho' this be an appearance in law, it is not a performance. *R. 1 Rol. 426. l. 40.*

To pay to the obligee ; payment to his wife, without more, is not a performance. R. Rol. 427. l. 10.

To enfeoffe one, and he enfeoffs him and others. 1 Rol. 427. l. 45.

That two shall enfeoffe, and one enfeoffs the whole. 1 Rol. 421. l. 45.

(G 12.) *According to the intent.] So, if a condition be, that it shall be lawful for the lessee to enjoy ; if the lessor enters upon him wrongfully, it is a breach ; for the intent was, that the lessor should not interrupt him. R. 1 Rol. 427. l. 15. R. Cro. El. 544. Vide ante (E). Vide post. (M 1.)*

That the lessee shall not parcel out his land from the house ; if he leases to another the house and part of the land, and afterwards leases the other part, it is a breach. R. 1 Rol. 427. l. 20.

That he assure land which was bargained and sold to him ; tho' the bargain and sale were void, yet he ought to assure the land, which was pretended to be bargained. R. 1 Rol. 427. l. 30.

That he acquit him ; if he gives an acquittance, but does not acquit him in fact, it is not sufficient. 1 Rol. 433. l. 43.

That he enjoy without damage for want of warranty ; if he does not render in value upon the warranty, is not sufficient. 1 Rol. 433. l. 37.

That he shall not alien ; and he gives to his son. 1 Rol. 433. l. 50.

If a recognizance be, upon condition to try an indictment the next term, and a trial is had, but the verdict quashed for a defect in the venire-facias ; the recognizance is forfeited, for it ought to be an effectual trial. R. Mod. Ca. 179.

(G 13.) *Ought to be performed bonâ fide.] So, a condition ought to be performed truly and bonâ fide, and not colourably ; and therefore, if it be agreed, that the money shall be paid at the day limited by the condition, but shall be returned immediately to him who pays it, the condition is not performed. Co. L. 209. b.*

If a condition be, quod licitum foret to A. to see all the accounts of the testator, and one of the executors refuses to shew them, and the other, who was bound with such condition, says, that he does not deny it ; it is not a performance, for he ought to shew all the accounts. R. 1 Rol. 431. l. 5.

(G 14.) *But it is sufficient, if it be performed in substance.] But it is sufficient, if the substance of the condition be performed. Vide 1 Rol. 426. l. 8.*

If a condition be, that he suffer the lessee to enjoy without the interruption of any ; an entry of a stranger by an elder title is not a breach, for the word, suffer, is passive. 1 Rol. 425. l. 45.

So, a condition, that he permit land to descend ; tho' his son is outlawed, and cannot take. R. 1 Rol. 426. l. 5.

That he deliver letters patents ; and he delivers an exemplification of them. 1 Rol. 426. l. 10.

That he enfeoffe ; and he conveys by lease and release. Semb. 1 Rol. 426. l. 12. Co. L. 207. a.

That he grant the reversion ; and he enfeoffs, and the tenant re-enters. 1 Rol. 426. l. 15.

That he give licence to carry goods ; and the party is disturbed by a stranger. 1 Rol. 426. l. 25, 20.

That

That he withdraw his suit ; and he discontinues. 1 Rol. 427. l. 5.

That the lessee may enjoy without molestation, and a rent-seck is issuing out of the land ; it is not a breach, for the possession is not incumbered with it. 1 Rol. 434. l. 15.

And if the rent-seck be to the queen, who may distrain of common right by her prerogative ; it is not a breach, for he is not bound to discharge things of common right. *R. 1 Rol. 434. l. 20. Vide ante (E).*

A condition, *that he pay to A. and other parishioners of B. if he pay to A. and two others, it is sufficient. R. Mo. 68.*

If *A. be bound by recognizance to perform the will of B. and to satisfy all bequests according to his true intent, who devised lands held in capite to C. in fee ; if the heir enters for the third part, it is not a breach.*

[A note for payment of money on a *South-Sea* contract, is a performance or composition as well as a bond. *Fotheringham v. Mozato, P. 1722, Bunb. 108.*]

[Bills of exchange were drawn by *A. in England* on *B. in the East Indies*, payable *sixty days after sight*, and a bond was entered into, conditioned to be void, if the bills should be *duly paid in India*, or come back to *England* duly *protested for non-payment*, and the amount of them paid by the obligor within a certain time after they should be so returned *protested for non-payment*. The bills were sent to *India* ; but before they arrived, *B. the drawee* had left the country, and his agent there refused to accept them. They were then protested in *India* for *non-acceptance*, sent back to *England* so protested, and, being presented to the drawee here for payment, were *protested for non-payment*. This was holden to be a *substantial* performance of the condition of the bond. *French v. Campbell, C. P. Trin. 33 Geo. 3. 2 H. Bl. 163. Campbell v. French, in error, B. R. H. 35 Geo. 3. 6 T. R. 200. contra.*]

(H) Condition to make Assurance.

IF a condition be *to levy a fine, or make an assurance*, without saying, at whose charge ; it shall be at the costs of him, who is bound to do it. *1 Rol. 422. l. 50.*

And the obligor ought to sue a writ of covenant for the fine, in the name of the obligee. *1 Rol. 422. l. 52. Cont. 1 Rol. 458. l. 40. D. cont. 5 Co. 127. a.*

If a condition be *to make assurance*, he ought to make an effectual assurance ; and therefore, if it be *to make a feoffment*, a charter of feoffment, with a letter of attorney to make livery, is not a performance, if livery be not made. *1 Rol. 425. l. 35.*

To surrender a copyhold, is not performed by a surrender to copyhold-tenants, if it be not presented at the next court. *R. 1 Rol. 425. l. 20.*

If a man bargains and sells land by indenture, and covenants to make a good estate before *Christmas* next ; an inrolment of the indenture before is not sufficient, but he ought to levy a fine, make a feoffment, &c. *R. 3 Leo. 1. Bend. pl. 62. And. 27.*

If a covenant be *to make assurance*, &c. he ought to do every thing that is necessary to be executed by him, tho' without some other act, as livery, inrolment, &c. the assurance is not complete. *R. 1 And. 56.*

But if a condition be *to make such a release, &c. as A. shall direct ;*
if

if he executes that which *A.* directs, it is enough, tho' it be not sufficient. *D. 5 Co. 23. b.*

So, if it be to make a sufficient estate by the advice of *A.* who advises that which is not sufficient. *5 Co. 23. b.*

So, it ought to be an absolute assurance; for if a man be bound to make an absolute assurance of a copyhold, a conditional surrender is not a performance. *R. 1 Rol. 425. l. 10.*

So, if he be bound to make assurance, generally. *1 Rol. 425. l. 15.*

If a condition be to make a conveyance of such land, or, to assure such land; he ought to make any conveyance or assurance that shall be required.

So, if it be to do all acts for assuring. *Yel. 45.*

And if a conveyance, generally, be required, he ought to execute some sort of conveyance. *R. Yel. 45.*

If a fine, or bargain and sale be afterwards demanded, he ought to do it: for he is bound to do all acts *toties quoties* he shall be required. *Ibid.*

If a note of a fine to be acknowledged before a judge of assise be required; he ought to do it, tho' a writ of covenant is not depending; for it is preparatory. *R. Mod. 810. 2 Cro. 251.*

If a common recovery be required; he ought to do it. *1 Rol. 427. l. 25.*

If it be to make assurance at the costs of the obligee; he ought to make, tho' not necessary, all the assurances required. *Per two J. Mo. 570.*

If the condition be to make such assurance for money as counsel shall devise, and he devises an obligation of 1000 *l.* for payment of 100 *l.* he ought to execute it. *1 Rol. 423. l. 25.*

Otherwise, if it be to make such reasonable assurance. *1 Rol. 423. l. 30.*

If it be to make an obligation, and he tenders an obligation which binds his heirs; he ought to execute it. *1 Rol. 424. l. 32.*

If there be a receipt for purchase-money contained in it; he ought to execute it. *Dub. Mo. 367.*

If a condition be to assure to such an one as *B.* shall name; an assurance to *B.* himself is good; for his acceptance is a nomination of himself. *1 Rol. 424. l. 10.*

To assure to *B.* and his heirs; if *B.* dies, it shall be made to his heir; for the copulative shall be construed in the disjunctive. *R. 1 Rol. 450. l. 50.*

But if the condition be to make an assurance or conveyance, and a warranty or covenant be in the deed; he is not bound to execute it. *1 Rol. 424. l. 37. R. 2 Cro. 571. 2 Rol. 191. R. 1 Leo. 29. Dub. 1 Sid. 467. R. 1 Mod. 67. Per two J. And. cont. 2 Leo. 130. Per Co. 1 Rol. 71.*

So, he is not bound to execute an obligation, or statute for enjoyment; for that is not an assurance. *2 Cro. 115.*

Yet a conveyance with reasonable covenants he ought to execute. *Cont. 2 Cro. 571. Acc. Ray. 190. 1 Mod. 67.*

So, tho' a condition be to make such assurance as counsel shall advise, and the counsel advises an obligation. *1 Rol. 423. l. 10. 2 Cro. 115.*

So, if it be such assurance of an annuity as counsel shall advise, and he advises an obligation. *Dub. 1 Rol. 423. l. 20.*

Otherwise, if, all acts for assurance which counsel shall devise. *Per Popb. 1 Rol. 423. l. 15.*

So, if it be *all reasonable acts for assurance*. R. Yel. 45.

So, he is not bound to execute an assurance, which contains more than the condition; as, a fine of four houses, where the condition was for two only; tho' the use of the other two will be to the conusor. R. 1 Rol. 425. l. 5. R. 1 Sid. 467.

If a condition be *to make such reasonable assurance of land in fee, reserving rent to the feoffor in fee, as counsel shall advise*, who devises a feoffment reserving rent in fee; it is not good, for it will be a rent-seck, and the deed belongs to the feoffee. R. 1 Rol. 423. l. 35.

So, tho' the agreement be to do it *by deed*, and he devises a feoffment by deed poll; for it belongs to the feoffee. 1 Rol. 423. l. 30.

Otherwise, if the feoffment was by indenture. Semb. 1 Rol. 423. l. 45.

If a condition be *to be bound with A.* which imports a joint obligation, he need not execute an obligation joint and several. R. 1 Rol. 424. l. 40.

Tho' it be *by such a writing and in such a sum as B. shall agree*, and he agrees to an obligation joint and several. Semb. 1 Rol. 424. l. 45.

If a condition be *to assure to B. as his counsel shall advise*; if B. himself devises, he is not bound to do it. R. 5 Co. 19. b. Cro. El. 297. R. cont. Cro. El. 465. 1 Rol. 466. l. 20.

Otherwise, if it be *as counsel may advise*. Semb. 1 Rol. 424. l. 5.

And if his counsel advises B. who gives notice of it to the obligor, it is well, and more proper than if counsel advises the obligor himself. R. 5 Co. 19. b. 1 Rol. 424. l. 15. Vide Cro. El. 298.

Otherwise perhaps, if it was, *as counsel advises the defendant himself*. Per Poph. Cro. El. 298.

If it be *to make a release upon the performance of all the other part*, who was to make a feoffment at the charge of B. he need not make the release before the feoffment, tho' B. did not tender the charge. Dy. 371. a.

If a condition be *to assure as counsel advises*; it is sufficient, that it be notified what sort of conveyance his counsel advises. Per Poph. Mo. 595.

But if it be *as counsel devises*, he ought to tender the conveyance engrossed. Ibid.

And if a condition be *to make such assurance as the obligee or his counsel shall advise*; he ought to give notice to the obligor what assurance is devised or advised. 5 Co. 23. b.

So, if it be *such release, &c. as A. his counsel shall advise*; he ought to procure A. to direct the release. R. 5 Co. 23. b. Cro. El. 716. D. cont. 1 Leo. 105.

If it be *to make such assignment as counsel shall advise*; he ought to procure counsel to advise. Dub. 3 Mod. 192.

But if it be *to make such release, &c. as a judge, or a stranger shall advise*; the obligor ought to procure his advice. R. 5 Co. 23. b.

Or, *such as satisfies his counsel*; the obligor ought to tender a release to the counsel of the obligee, to know if he be satisfied with it. R. 2 Lev. 95.

So, if it be *to assure at the charge of the obligee, &c.* he ought to notify what assurance he will make, before the other need tender the charges. R. Mo. 454. Ow. 157. 5 Co. 22. b. Cro. El. 517. 2 Mod. 75. Vide Election, (A 1, 2.)

Or, *to make any particular conveyance, as a feoffment, &c.* he ought to notify what feoffment, and how he will make it. R. 5 Co. 22. b. Cro. El. 517. But

But if a condition be *to assure such land to another*; he ought to make the assurance at his peril.

So, if it be *to assure at the charge of the obligee*; he ought to assure without a tender of the charges, for the obligee does not know what charge shall be paid till the obligor gives notice what assurance he will make. *R. 5 Co. 22. b. Mo. 454. Cro. El. 517. Ow. 157.*

So, if it be *to make a feoffment or other particular assurance*; the obligor shall do the first act, and give notice what feoffment, &c. he will make. *5 Co. 22. b. Per Walmsley, but the other judges cont. Cro. El. 517.*

Or, *to make the assurance which his own counsel shall devise*; he ought to procure his counsel to devise. *Per Gawdy, 1 Rol. 464. l. 1.*

If it be *to assure land, upon request*; he ought to make a good estate at his peril, without a tender of a conveyance by the obligee: for the request does not relate to the manner of conveyance but to the time. *R. 1 Rol. 465. l. 5. R. Mo. 682.*

So, if a condition be *to make, and upon request to seal an obligation*. *Z. 1 Rol. 465. l. 25.*

If a condition be *to execute a release to the satisfaction of the counsel of the plaintiff*; he ought to do it without a tender. *R. Ray. 232. 1 Vent. 255. 1 Mod. 104.*

If a condition be *that two make an assurance as shall be devised*, and the assurance be devised and tendered to one, who refuses; the condition is broken, for he need not tender to both together. *1 Rol. 454. l. 45.*

If a condition be, *to make such assurance as the obligee shall devise*; he ought to execute it immediately when it is tendred, and shall not have time for advising with his counsel. *R. 2 Co. 3. 1 Rol. 424. l. 25. 440. l. 5. 15. 441. l. 35. R. Dy. 338. a.*

So, if it be *such assurance as the counsel of the obligee shall devise*, and he tenders a surrender, &c.

So, if he tenders a letter of attorney to make a surrender, he ought to take notice of the law, if it be an assurance within the condition, and shall not have time for advising. *R. 1 Rol. 441. l. 45. Cro. Car. 299. Vide Jon. 314.*

But if he advises a fine, he shall have a reasonable time to do it. *R. 1 Rol. 441. l. 40. 466. l. 15.*

If he be bound *to make assurance at his own costs as shall be required*; the obligee cannot require more assurances than are necessary. *Mo. 570.*

If it be *to surrender a copyhold upon request*; he shall have a reasonable time for it. *Semb. Godb. 445.*

If a request be *to surrender by attorney*; he need not do it: for the covenantor has his election how he will surrender. *Godb. 445. Jon. 314.*

(I) Condition to indemnify.

A CONDITION *to indemnify against A.* is broken by his threatening to beat the obligee, by reason of which he dares not go about his business. *1 Rol. 453. l. 12.*

If a condition be *to save harmless from an obligation in which he is bound to A.* the obligor ought to discharge it by release, or otherwise. *1 Rol. 432. l. 25.*

So, if it be *to save harmless from all suits and demands concerning that obligation*. *5 Co. 24. a.*

And therefore, if he pays the money at the day, tho' he was not sued or arrested for it; the condition is broken. *R. 5 Co. 24. a. R. 1 Rol. 433. l. 5.*

So, if the obligation be forfeited, whereby he is liable to be sued. *Semb. 1 Rol. 432. l. 30.*

A fortiori if he be sued, tho' the obligation be satisfied before execution. *R. 1 Rol. 432. l. 45.*

So, if a condition be *to be discharged of tithes*; it shall be broken if he be sued for tithes, tho' they be not recovered. *1 Rol. 430. l. 10.*

If a condition be *to save harmless from all actions which may arise upon the releasing of D. out of execution*: he ought to indemnify him from an action upon his promise not to release. *R. 1 Rol. 431. l. 45.*

To save harmless from all legacies; he ought to indemnify from a decree in a court of equity for a legacy. *R. 1 Rol. 430. l. 5.*

But if a condition be *to save harmless from all things contained in an indenture*, he is not bound to indemnify from a collateral thing; as, from an obligation in which he is bound to perform the covenants in the same indenture. *1 Rol. 432. l. 35.*

Nor, from actions, in which he has a lawful defence without the obligor. *1 Rol. 432. l. 42.*

So, a covenant to indemnify *from all rents payable to the lessor*, is not broken, if the rent be in arrear. *1 Rol. 433. l. 10.*

Or, if an illegal distress be taken for the rent. *Ibid.*

[If a covenant be *to save harmless against a seizure made by A. it extends to it, whether the seizure be tortious or not*; but if a general covenant to save harmless, it extends not to tortious acts. *Perry v. Edwards, M. 7 G. Str. 400.*]

So, a condition *to perform an award, by which A. shall be acquitted of such a matter in a bill in Chancery depending against him*, is not broken by the filing a new bill against him for the same matter, if no process issues against him. *R. 1 Rol. 432. l. 20.*

So, a condition *to save without damage from all prior incumbrances by him*; a prior assignment by him to B. is not a breach, if B. does not enter nor disturb the possession. *R. 1 Rol. 430. l. 15.*

So, a bill in Chancery, alleging that a lease was in trust for the lessor, is no breach; for it does not meddle with the possession. *R. 1 Rol. 430. l. 45.*

So, tho' the words are large, they shall not be extended beyond the intent; as, if a condition be, *to save harmless from the damages A. shall sustain on account of a bastard*; he ought to indemnify from the charge of maintaining it, but not from a legal prosecution against A. for it. *R. Lut. 669.*

So, if a covenant be *to save harmless upon request*; if a damage happens before request, he is bound to indemnify: as, if a statute be extended before request. *R. Mo. 189.*

(K) Condition in the Disjunctive.

(K 1.) How performed.

IF a condition be in the disjunctive, he who ought to do the first act shall have an election to do the one, or the other. *Co. L. 145. a.*

As, if a condition be *to enfeoff of such or such land, to pay gold or silver,*

ver, to deliver one thing or another; the obligor has an election to do the one, or the other. 1 Rol. 446. l. 20.

So, if it be to enfeoff, pay, &c. at the request of the obligee; for his request only ascertains the time of the doing it. 1 Rol. 446. l. 25. 30. 467. l. 5.

So, if it be to do at Michaelmas at his request, or at the feast of Easter. 1 Rol. 446. l. 40.

But where the disjunctive goes only to the time, and that is referred to the request of the obligee, it gives the election to him; as, to do at Mich. or before, at the request of A. 1 R. 446. l. 35. 37.

If a condition be that before Mich. he make a lease for thirty-one years if A. assents, otherwise, for twenty-one years; A. does not assent; he ought to make a lease for twenty-one years before Mich; 1 Rol. 446. l. 15.

[A. devises lands to trustees to pay the rents to his son B. during life, then to stand seised to the use of B.'s wife for jointure, then to the use of sons of B. then to the use of daughters of B. then to A.'s daughters C. and D. proviso if B. marries a woman without competent fortune, or without the consent of the trustees, then after B.'s death to stand seised to the use of C. and D. B. marries a woman with competent fortune but without consent of trustees. This is sufficient performance of this condition precedent, especially as it is a condition in restraint of marriage. Long v. Dennis, P. 7 G. 3. 4 B.M. 2052.]

(K 2.) When it shall be excused.

If the condition be in the disjunctive, and the obligor has an election to do the one thing or the other, if one part becomes impossible by default of the party, he shall not be bound to perform the other part; as, if it be to make such assurance to A. as A. shall devise, or upon default to pay 500 l. If A. does not tender an assurance, he need not pay the 500 l. R. 1 Rol. 446. l. 45. 2 Mod. 202, 203.

[But a condition to do one of two things, one of which becomes impossible, is no reason for not performing the other. Da Costa v. Davis, C. P. E. 38 Geo. 3. 1 Bos. & Pull. Rep. 242.]

To deliver an obligation, or execute a release which A. shall tender; and he does not tender a release. R. 1 Rol. 447. l. 10.

So, if one part becomes impossible by the act of God. Vide ante, (D 1.)

But where the election is not affixed to the obligor till one part be requested by the obligee; if it be not requested, the obligor ought to do the other part. 1 Rol. 447. l. 20.

So, if one part was impossible at the time of the making; he ought to do the other part. 1 Rol. 450. l. 40. 45.

So, if a condition be to make a lease to A. for life before Mich. or to pay to him 100 l. A. dies before Mich. and before the lease made; he ought to pay 100 l. to his executor. R. 1 Sal. 170.

Or, if a condition be that his son convey to B. and his heirs before Mich. or shall pay 70 l. and B. dies before Mich. he ought to pay the 70 l. Semb. 3 Mod. 232.

So, if a condition be that a stranger appear, or pay so much; if he cannot appear, he ought to pay. R. Ray. 373.

(K 3.) What shall be a Condition in the Disjunctive.

If a condition be in the copulative, but it is impossible to be so performed; it shall be taken in the disjunctive; as, if it be *that A. and his heirs or executors* do such a thing. 1 Rol. 444. l. 20.

That A. and his assigns do it. 1 Rol. 444. l. 25.

(K 4.) Annuity *pro Consilio*.

If an annuity be granted *pro consilio impendendo*; he ought to give his counsel on demand, for otherwise the annuity determines. 1 Rol. 435. l. 5.

Otherwise, if it was *pro consilio impenso & impendendo*. 1 Rol. 435. l. 10.

But the grantee need not travel, or do any thing but give his counsel, where he may be found. 1 Rol. 434. l. 30.

Otherwise, if a physician, who has an annuity *pro consilio & auxilio*. *Semb.* 1 Rol. 434. l. 40.

So, if it be granted *pro servitio & consilio*. 1 Rol. 434. l. 45.

And he need not travel with him, tho' the other is willing to pay his charges. 1 Rol. 434. l. 47.

So, he need not set his hand to a bill in *Chancery*. R. 1 Rol. 434. l. 50.

So, if the grantor does not disclose his case, the grantee shall be excused. 1 Rol. 434. l. 33.

So, if the grantee gives such counsel as he is able; it is sufficient, tho' it be not good. 1 Rol. 434. l. 35.

(L) When Non-performance shall be excused.

(L 1.) If done as near to the Condition as it can be.

IF the condition be performed in substance, it is sufficient. *Vide ante, (G 14.)*

So, if it be performed as near the intent of the condition as can be: as, if a condition be, *that the feoffee shall give the land to the feoffor and his wife, and the heirs of their bodies, &c.* and before the estate is re-given, the feoffor dies; the condition will be performed, if the feoffee gives it to the wife for life without impeachment of waste, remainder to the heirs of the body of the husband upon the wife begotten, *Lit. S. 352.*

Or, *that he shall give an estate to a layman in frankalmoigne* (which cannot be); it is sufficient if he makes an estate to him for life. *Co. L. 219. b.*

Or, *that he give an estate in frankmarriage to A. with a daughter of the feoffor* (which cannot be); it is sufficient if he make an estate to them for their lives. *Ibid.*

If a condition be *to enfeof two before such a day*, and one dies, he ought to enfeof the other. R. 1 Rol. 451. l. 2.

Or, *to enfeof A. and his heirs*, and A. dies; he ought to enfeof the heir; for *[and]* shall be taken as a disjunctive *[or]*. R. 1 Rol. 450. l. 50.

So, if an obligation be *to convey to A. and his heirs by feoffment or will, &c.* and A. dies in the lifetime of the obligor; he ought to convey to his heir. *R. Pal. 552.*

So, as well when the condition is to defeat as to create an estate. *Semb. cont. Co. L. 219. b.* But the instances there *acc.* where no prejudice ensues to the parties.

As

As if a condition be, *that if A. and B. pay such a sum at such a day, the feoffment shall be void*, and *A. dies before the day*; *B. may pay it.* Co. L. 219. b.

(L 2.) If the Feoffee accepts another Thing in Satisfaction.

(L 2.) *When it may be accepted.*] So, if a condition be *to pay such a sum at such a day*, and the feoffee or obligee accepts a horse, &c. or other collateral thing in satisfaction. Co. L. 212. b. R. 9 Co. 79. *Peytoe.* 1 Rol. 456. l. 5.

So, if a condition be, *that a stranger pay to the feoffee*; and he accepts a collateral thing in satisfaction. Co. L. 212. b.

Or, if he accepts a less sum before the day, in satisfaction. *Ibid.*

Or, if he accepts a less sum at the day, and gives an acquittance for the whole in satisfaction, under his seal; for the deed makes it to be in satisfaction of the whole. *Ibid.*

Or, accounts with the obligor at the day, and discounts so much due from the obligee to him. 1 Rol. 471. l. 5.

So, if the feoffee or obligee accepts a *chase in action*, in satisfaction; as a statute for payment of money at a subsequent day. Co. L. 212. b.

Or, another obligation for payment at a future day. *Ibid.* D. cont. 2 Cro. 100. & *Semb.* that the law is cont. *Vide post.* (L 3.) *Vide* 1 Mod. 225. *Hob.* 68. *Cro. Car.* 86.

So, if he accepts a copyhold surrendered to his use in satisfaction. R. 1 Rol. 471. l. 25.

So, if a promise or contract, without deed, be to do a collateral thing; money, or another thing may be accepted in satisfaction. 9 Co. 79. b.

(L 3.) *When not.*] But if a condition be to do a collateral thing; the feoffee or obligee cannot accept money, or another thing in satisfaction; for a contract in writing for a collateral thing shall not be altered by an accord without writing. Co. L. 212. b. R. 9 Co. 79. R. 1 Rol. 455. l. 50.

As, if a condition be *to deliver an horse, &c.* if the obligee accepts money, or other thing in satisfaction, it is not sufficient. Co. L. 212. b.

Or, *to give a recognizance for 20 l.* and he accepts 20 l. *Ibid.*

To perform covenants in an indenture. R. Dal. 106.

So, if a condition be *to pay money to a stranger*; it ought to be performed strictly, and it is not sufficient that the stranger accepts a collateral thing in satisfaction. Co. L. 212. b.

So, it is not sufficient, if the feoffee or obligee accepts a less sum in satisfaction, at the day, without a deed which acquits the whole. Co. L. 212. b. for a less sum cannot be a satisfaction for a greater.

And it ought to be a real and full satisfaction. *Vide Accord*, (A 1, 2. —B 1, &c.)

So, it is not sufficient, if the conusee of a statute, or recognizance, accepts an obligation in satisfaction; for it is of less force. 1 Rol. 470. l. 37.

So, it is not sufficient if the obligee, after judgment upon an obligation, accepts another obligation for a greater sum in satisfaction. R. 2 Cro. 579.

Or, after the day of payment, accepts a statute, or recognizance

(which is of a higher nature) in satisfaction. *R. 6 Co. 44. b. 45. b. Cro. Car. 86. 1 Rol. 470. l. 50. Vide ante, (L 2.)*

Or, after the day, accepts another obligation in satisfaction. *2 Cro. 579. Cro. Car. 86.*

Or, at the day, accepts another obligation for the same sum at a future day, in satisfaction. *Vide ante, (L 2.)*

Or, another obligation by the obligor and another. *R. Hob. 68, 91. Cro. El. 727. 1 Rol. 470. l. 30.*

Or, another obligation with a penalty, where the first was single. *R. Cro. El. 716. 727.*

So, if the obligee, before the day of payment, accepts another obligation for the same sum. *D. 2 Cro. 100. R. if he accepts an obligation generally. Cro. El. 716. 727. Cro. Car. 86.*

Or, a bill sealed. *R. Mo. 872.*

So, if a condition be *to pay money*; an agreement to accept a collateral thing in satisfaction is not sufficient, if it be not executed. *1 Rol. 456. l. 15 ad 30. Vide Accord, (B 1, &c.) 1 Rol. 470. l. 40.*

(L 4.) By Default of the Party.

(L 4.) *As upon tender and refusal.*] So the non performance of a condition may be excused by the default of the feoffee or obligee; as, if the feoffor or obligor makes a legal tender of the money, to the feoffee or obligee, at the day and place appointed, and he refuses to accept it. *Co. L. 207.*

Who may make a tender, and to whom, *vide ante (G 1, 2.)*; and at what time and place, *vide ante, (G 3, &c. G 9, &c.)*

A tender may be in bags or purses, without shewing or reckoning the money. *Co. L. 208. a.*

And it is sufficient, if the whole sum be in the bag, or more. *R. 5 Co. 115. a.*

So, if a condition be *to enfeoff, &c. upon payment of so much money*; a tender and refusal is *tantamount*. *Dal. 106.*

If pursuant to a condition upon a feoffment, &c. the money be duly tendered, and refused; the feoffee loses the money for ever; for it is a sum in gross, collateral to the land, and he has not any remedy for it by law. *Lit. 8. 335. 338.*

So, if a condition of an obligation be *to do a collateral thing*, as to deliver corn, timber, &c. tender and refusal is a perpetual bar. *Co. L. 207. a.*

So, if a statute, recognizance, or obligation be single, and afterwards there be a defeazance that it shall be void upon payment of a less sum; if such sum be tendered and refused, it shall be lost for ever; for it is collateral. *Co. L. 207. a.*

Otherwise, if an obligation be for payment of a less sum; this being a duty and part of the obligation, shall not be lost by tender and refusal, for if he pleads a tender he shall say *uncore prist*. *Co. L. 207. a.*

How a tender shall be pleaded, *Vide Pleader, (2 G 2.—2 W 28. 49.—3 K 23.—3 M 36.)*

So, if a condition be *to do any collateral act*, if it be duly tendred and refused, the performance shall be excused. *1 Rol. 458. l. 15. 455. l. 20 ad 35. R. 3 Lev. 24.*

(L 5.) *By voluntary absence.* So the performance of a condition shall be excused by the absence of the feoffee or obligee, when his presence was necessary for the performance; as, if a condition be, *that he enfeoff the obligee*, and he, having notice of the time, is absent. 1 Rol. 457. l. 30. 32.

If a condition be *to pay rent*, and the lessee is ready, but nobody comes to receive it for the lessor. 1 Rol. 459. l. 35.

But if his presence is not necessary, his absence shall not excuse, though the act is to be done to him; as if a condition be *to sing matins at such a day, in his manor, for A. and his family*; though they be absent, he ought to sing. 1 Rol. 457. l. 45.

To give a statute, or obligation to the obligee; for it may be done in the absence of the obligee. 1 Rol. 457. l. 40.

To grant an estate to one for life, remainder to B. though B. be absent, the condition shall not be excused. 1 Rol. 457. l. 45.

So, if a covenant be *that an horse shall run, &c. giving notice to A.* tho' A. absconds, by which notice can be given; yet the horse ought to run the race. R. 1 Sal. 214.

(L 6.) *By the obstruction of the obligee.*] So, the performance of a condition shall be excused by the obstruction of the obligee: as if a condition be *to build an house*; and he, or another by his order, hinders his coming upon the land. 1 Rol. 453. l. 59.

Or, says that it shall not be built. 1 Rol. 454. l. 2.

Or, interrupts the performance. 1 Rol. 454. l. 5. 20.

So, if a condition be *that the lessee shall leave a house in good plight*; and fire out of the chimney of the lessor next to it consumes it. R. 1 Rol. 454. l. 15.

If an annuity be granted, *till a benefice be given to the grantee*, and he is presented, but found unfit. R. 1 Rol. 435. l. 17.

So, if there be a recognizance to the king for appearance; and the party is imprisoned by A. and B. who act by lawful authority of the king. Semb. Mo. 122.

But it ought to be an obstruction which disables the performance. Vide post. (M 5.—N).

And performance shall not be excused by the negligence of the obligor.

Nor by the act of a stranger. Vide post. (L 14.)

(L 7.) *By default in doing the first act.*] So, the non-performance of a condition shall be excused by the default of him who ought to do the first act; as if a condition be *to resign a benefice for a pension, to be agreed between them*; the obligee ought to agree the pension, and tender the deed of it. 1 Rol. 458. l. 10. Who ought to do the first act, vide Election, (A 2.)

To enfeoff such an one as the obligee or feoffee shall name; he ought to give notice whom he names. 1 Rol. 463. l. 2.

If a condition be, *that a bailiff shall arrest a man at the suit of B.* he need not, till B. delivers to him a proper warrant; for this belongs to B. and it would be maintenance in the obligor, and the law will understand the words as is proper. R. 1 Rol. 465. l. 40.

That a bell shall be carried to the house of the obligor, by the men of M. and there weighed, and put in the fire in their presence, and then the
obligor

obligor shall make a bell in tone and sound agreeable to the others; it shall be weighed and put into the fire by the obligor, for it belongs to his occupation. 1 Rol. 465. l. 50. Pl. Com. 15. b.

(L 8.) *In not giving notice.*] So, if a condition be to do a thing upon the performance of an act by the feoffee or obligee, which is secret, and lies only in his breast, the performance of the condition is excused, till the feoffee or obligee gives notice that he has performed the first act: as if a condition, covenant, or promise be *to pay as much for goods as every other pays*; the obligee shall give notice how much another pays. 1 Rol. 463. l. 25. Hob. 51. R. 2 Cro. 432. 1 Rol. 468. l. 50. When notice is necessary, *vide post.* (L 9.)

To account before such auditors as the obligee shall name; he ought to give notice what auditors he has assigned. R. 1 Rol. 462. l. 50.

To execute such deed or assurance as the obligee or his counsel shall devise. *Vide ante* (H).

To pay so much to A. and B. at their full age; the condition is not broken till demand, or notice of full age. R. 2 Cro. 57.

So, a title to land shall not be defeated by a secret condition, or conveyance, to which he is a stranger, without notice of it given to him: as if a father covenants to stand seised, or devises to his eldest son, upon condition that he do such a thing; the heir shall not lose his estate by the non-performance of the condition, without notice of it. R. 8 Co. 92. a. Frances. R. 3 Mod. 34. *Vide post.* (L 9.)

So, if a condition be, *to pay rent to the lessor or his assigns*; the lessee shall not lose his estate by non-payment to the bargainee of the reversion, without notice of it. *Per Wray*, 3 Leo. 96. *Per Popph.* 5 Co. 113. *Agreed*, 8 Co. 92. *Vide post.* (O 1, 2.) *Vide Copyhold*, (M 4.)

If a condition be, *that if his heir does not pay rent, it shall be to his executors, and if they do not pay, to his younger son*; the estate shall not be forfeited by the non-payment of the executors, till notice that the heir did not pay. R. 2 Cro. 145.

When notice shall be given of the time of performing a condition. *Vide ante*, (G 9.)

How notice shall be given, *Vide Pleader*, (C 73, &c.)

How request shall be made, *Vide post.* (L 11.)

(L 9.) *When not.*] But generally, every one, who has an interest in land, shall take notice at his peril of acts done concerning the same land: and, therefore, the grantee or bargainee of the reversion shall distrain for rent, shall have waste, without notice to the lessee of the assignment. 5 Co. 113.

If a bailiff of a bishop collects rent of a lessee of his predecessor, not warranted by *sf.* 1 El. 19. among other rents, and pays it to the bishop: this acceptance of the rent affirms the lease, without other notice. R. Cro. Car. 95. 1 Rol. 476. l. 15.

Especially, where no one is bound to give notice: as if a husband seised for life, remainder to his wife for life, remainder to his son in tail, makes a feoffment with warranty, which bars the son, and after his death the wife joins with the son in a fine; the estate of the wife is forfeited, without notice of the feoffment. R. Cro. Car. 392. 1 Rol. 856. l. 25.

If a woman lessor marries, the lessee ought to take notice, and pay his rent to the husband; for if he afterward pays to the wife, without his consent, he shall pay over again to the husband. *R. 2 Cro. (617.)*

So, every one ought to take notice of a condition, &c. contained in the same deed by which he claims: as if a devise be to *A.* upon condition *that he do not marry without consent*; the devisee shall take notice of the condition at his peril; for it is limited in the same conveyance by which he claims, and no one is bound to give notice. *R. Mod. 87. 311. 1 Vent. 204. 2 Lev. 22. Vide infra.*

If a devise be *for charitable uses, and if not performed, that it shall be to the mayor and commonalty of London*, there needs no notice. *R. Cro. Car. 577.*

So, if a fine be *to the use of A. in fee, but if B. pays 10*l.* before Mich. to him in fee*; *B.* dies; his heir shall take notice at his peril of this condition. *R. 1 Rol. 469. l. 25.*

So, if a devise be to an heir, upon condition *that he do not marry under 1000*l.** he ought to take notice of the condition, for he takes his estate by the same will, and no one is bound to give notice, *R. Cart. 172.* And there it is said, that this differs from the case of *Frances*, 8 *Co.* 92. where the condition was, that he should not hinder the executor doing such an act, which is named by the will, and cannot be known, without notice of it. *Cart. 172.*

So, if a devise be upon condition, *that he do not marry without consent, &c.* *R. Ray. 237. 2 Lev. 22. Vide supra.*

Tho' the devisee be an infant. *R. 1 Mod. 86. 1 Vent. 200. Vide Infant.*

So, if a condition, covenant, or promise be to do an act to a stranger, or upon performance of an act by a stranger, there needs notice; for it lies equally in the knowledge of the obligor and obligee, and the obligor takes upon himself to do it: as if a condition be *to pay when A. marries*, there needs no notice when *A.* marries. *R. 1 Rol. 462. l. 10. 468. l. 13. Vide Pleader, (C 75.)*

Or, *when A. returns into the realm.* *R. 2 Cro. 492. 1 Rol. 463. l. 6.*

Or, *when A. rides to York five times in five days.* *1 Rol. 463. l. 12.*

So, *to pay, if A. does not pay.* *R. 2 Cro. 684. R. 1 Rol. 462. l. 25. 463. l. 45.*

To pay so much as A. shall name. *R. 2 Bul. 144. R. Cro. Car. 133. 1 Rol. 464. l. 5.*

To pay for all the acres above twenty so much as measured by A. *R. 1 Rol. 462. l. 5.*

To discharge from all escapes by A. *R. Hob. 14.*

To stand to the award of A. *R. 1 Rol. 464. l. 40. 468. l. 7.*

Or, *to pay all arrears which shall be found upon account before A.* 8 *Co.* 92. *b. 1 Rol. 468. l. 5.*

To pay the costs which shall appear due by his attorney's bill. *R. 1 Rol. 467. l. 30. R. 4 Mod. 230.*

To pay so much as shall be recovered by A. *1 Rol. 468. l. 10.*

So, if a condition, covenant, or promise be to do, upon the performance of any certain and particular act by the obligee himself, he ought to do it, without notice by the obligee, that the act is performed;

formed; for he takes it upon him to do it at his peril: as if a condition be to pay so much when the obligee marries, there need not be notice of his marriage. R. 2 Cro. 102. 228. Yel. 168. R. 2 Cro. 405. 1 Rol. 468. l. 30. R. 2 Bul. 254. R. 3 Bul. 326. R. Poph. 164. R. Cro. Car. 34. Hut. 80. 1 Rol. 463. l. 20. Per Ch. J. 1 Sid. 36.

Or, when the obligee delivers a horse to B. Per Yel. 1 Rol. 461. l. 45.

Or, comes to London, &c. Per Dod. 2 Bul. 145. R. 1 Rol. 462. l. 15. Per Warb. cont. Hob. 68. R. cont. 1 Bul. 44. Dub. Ow. 108. Acc. Hut. 80. 1 Rol. 469. l. 5.

Or, becomes surety for his father. 1 Leo. 105. R. 2 Cro. 287.

So, to pay so much as the obligee borrows of B. Per three J. 1 Bul. 12. R. 1 Rol. 467. l. 50.

Or, for so many acres as shall appear when they are measured. R. 2 Cro. 472. 391. 1 Rol. 462. l. 45. 469. l. 10. 15.

Or, to pay so much as he shall sell at to B. R. 2 Cro. 432. 1 Rol. 463. l. 36.

To surrender to the obligee or his assigns upon demand; he ought to surrender to the assignee upon demand, without notice of the assignment. R. Poph. 136. 1 Rol. 465. l. 10.

To pay when he delivers wood to B. to his use. R. 1 Rol. 464. l. 30.

So, to pay so much as will content him for such a journey; there need not be notice how much will content him. R. 1 Leo. 123.

To repay 20 l. if he dislikes such land; there need not be notice that he dislikes it. R. Cro. El. 834. 1 Rol. 464. l. 20.

To deliver corn on shipboard at such a port; there need not be notice when the ship is ready. R. 1 Rol. 464. l. 25.

To pay upon the return of a ship from Hamburg to D. 1 Rol. 469. l. 40.

So, if several are bound by obligation, covenant, &c. to do an act, upon notice to them; notice to one is sufficient. R. Mo. 555.

So, if an act ought to be done upon notice to B. the absence of B. by which notice cannot be given, excuses notice. R. 1 Sal. 214.

When notice is not necessary of a by-law, &c. Vide Pleader, (C 75.)

(L 10.) *In not requesting.*] If a condition be, that the lessee repair, and that the lessor find timber; the lessee ought to demand timber, and give notice how much will be sufficient. R. 1 Rol. 465. l. 20.

That he enrol a deed in Guildhall; the other ought to request. 1 Rol. 458. l. 50.

That he procure his apprentice his freedom, if it be requested; an express request is necessary. R. Sal. 585.

(L 11.) *How a request shall be made.*] If a condition be to do upon request, the request ought to be certain and express: and therefore, if a lessor ought to find timber to the lessee for repairs, it is not sufficient that the lessee demand timber, generally, but he ought to notify how much is necessary. R. 1 Rol. 465. l. 20. Vide Pleader, (C 69, &c.)

If a condition be to surrender a copyhold upon request; it is not sufficient that he require him to seal a letter of attorney to make the surrender, but he ought expressly to require a surrender. R. 1. Rol. 467. l. 5. Jon. 314. So,

So, the request ought to be to the person himself, who ought to do it.

And therefore, it is not sufficient to say, that he could not find him, and made proclamation in the church, and at several markets, to notify his request. *R. 1 Rol. 443. l. 45.*

But where a condition is *to deliver possession to the lessor or his assigns*, who assigns to two, a request by one is sufficient. *R. 1 Rol. 428 l. 10.*

So, if a condition be *to make him free of a company at the end of seven years, if he be requested*; he ought to make request the last day of the seven years at a convenient time before night, that the thing may be done. *R. Sal. 585.*

And a request at any place is sufficient, tho' the thing is to be performed at a certain place. *Vide ante, (G 9.)*

So, if a condition be to do upon request, and he is disabled to perform; there needs no request, for it would be in vain. *R. 5 Co. 21. a. Semb. Lut. 308. Vide post. (M 2, 3.)*

(L 12.) Non-performance shall be excused by the Act of God.

So, the non-performance of a condition shall be excused by impossibility, or the act of God, if there be no default in the party. *Vide ante, (D 1, 2.)*

So, in a promise, as well as in an obligation or condition, if the party be disabled by the act of God before a breach, he shall be excused: as if a man lends a horse to B. for his use, who promises to re-deliver it upon request, and the horse dies before request. *R. Pal. 550.*

(L 13) Non-performance shall be excused by Act of Law.

So, the performance of a condition shall be excused by an act of law, which is necessary and inevitable; as if a condition be, *that the feoffee pay so much out of the profits annually to charitable uses*; if he dies, and his heir be in ward to the king, the payment shall be excused; for it ought to be out of the profits, which are transferred by act of law to the king. *R. 1 Rol. 451. l. 30.*

But if a condition be, *that he shall be his attorney in all pleas*, and he is made sheriff; this does not excuse him. *1 Rol. 451. l. 25.*

If it be, *that he pay rent to A. as long as he enjoys the land, and he surrenders to the obligee.* *R. Mo. 597.*

(L 14.) But not by the Act of a Stranger.

If a condition be to do a thing, and a stranger interrupts him; that does not excuse the performance; as if he disseises him. *Vide post. (M 5.)*

Or, recovers goods to be delivered. *1 Rol. 452. l. 5.*

Or, imprisons a person who ought to appear. *1 Rol. 452. l. 10.*

So, if a condition be *to do a thing to a stranger*, who refuses to accept it; this does not excuse, for he took upon himself to do it. *1 Rol. 452. l. 30.*

Or, *to do by direction, &c. of a stranger.* *Lit. 13.*

So, if a condition be *to surrender to a stranger*; a surrender to another

other person, by his request, is no performance, for he cannot vary the condition. *R. 1 Rol. 457. l. 15.*

Or, after recovery, to enfeof a stranger; and he accepts it before the recovery. *Semb. 1 Rol. 453. l. 20.*

(M) What shall be a Breach.

(M 1.) An Act contrary to the Intent.

BUT it shall be a breach of a condition, if the feoffor or obligor acts contrary to the very intent of the condition; as if a condition be for quiet enjoyment, and the lessor enters upon him wrongfully. *1 Rol. 429. l. 30. 45. 430. l. 20. Vide ante, (G 12.) Vide ante, (E. — G 12, &c.) Vide Chancery, (2 Q 2, &c.)*

If a condition be, that he do not let a shop-yard, or other thing appertaining to a house, to such a one as sells coals; and he lets the whole house. *1 Rol. 427. l. 35.*

That he do not interrupt in an office; if a new officer be made, who ousts him, yet if the obligor also interrupts, it is a breach. *R 1 Rol. 453. l. 5.*

That he do not make debate about an administration; and he causes him to be cited upon it. *1 Rol. 434. l. 2.*

That he do no waste; and he permits waste. *1 Rol. 428. l. 20. Cont. per three J. 1 Rol. 428. l. 30.*

That he do not assign; and he assigns in equity. *R. Ray. 460.*

If a condition be, that he enjoy without the interruption of any; a prosecution in a court of equity is a breach. *R. Ray. 371. Per Dy. cont. 3 Leo. 71.*

That he permits him to reap corn; a prohibition by parol is a breach. *Ray. 371.*

If a condition be, that the heir do not disturb by suit or otherwise, if he enters upon him it will be a breach. *2 Mod. 7.*

So, if a condition be, that he instruct him as his apprentice in chirurgery, and maintain and employ him in domo & in servitio, for so many years; if he sends him to the Indies with expert chirurgeons for his better instruction, it will be a breach. *R. 1 Rol. 427. l. 50. Hob. 134.*

Otherwise, if he sends him several journies, within the kingdom, where he returns after the cure performed. *1 Rol. 445. l. 12. Hob. 134.*

Or, if he sends him out of the kingdom, when the nature of the service requires it: as if he was apprentice to a merchant or sailor. *1 Rol. 428. l. 5. 445. l. 15. Hob. 135.*

If a condition be, that he do not devise a term for years to A. and he devises it, but his executor does not assent; yet it shall be a breach, for he did all that was in him to devise it. *Per three J. 1 Rol. 428. l. 45. 2 Cro. 75.*

So, if he devises it to his executor for payment of debts; though his executor would have it without a devise. *1 Rol. 428. l. 52.*

So, if a condition be, that he doth not alien a term; and he devises it to his executor. *R. 1 Rol. 429. l. 5.*

That he do not grant a reversion without licence; and he grants, but the lessee does not attorn. *Per three J. 1 Rol. 429. l. 10.*

That

That he do not assign, so that it comes to A. and he assigns to B. for he puts it in the power of B. to assign to A. R. 1 Rol. 429. l. 15.

That the lessee or his assigns do not alien; and the executrix of the lessee takes husband, who aliens. Semb. Dy. 6. b.

(M 2.) By a Disability to perform.

So, a condition shall be broken, if the party has disabled himself to perform it: as if a condition be *to enfeof the feoffor*, and he enfeoffs a stranger. *Lit. S. 355. 1 Rol. 447. l. 40.*

Or, makes an estate in tail, or for life, to a stranger. *Lit. S. 355.*

Or, enters into religion. *Co. L. 221. b.*

Or, suffers a recovery against him by default. *Co. L. 222. b. if execution be sued upon it. 1 Rol. 447. l. 45.*

Or, a real discovery be against him, and execution thereupon. *1 Rol. 448. l. 25.*

(M 3.) Or to perform in the same Plight.

So, if he be disabled to perform in the same plight and condition that it was when the condition was created. *Co. L. 221. a.*

As, if a condition be *to enfeof*, and he leases for years to another. *Lit. S. 356. R. 1 Co. 25. b.*

Tho' the lease be to commence *in futuro*. *Co. L. 221. a. R. 2 Co. 59.*

Tho' it be only a possibility of a charge *in futuro*. *Co. L. 221. b.*

So, if he takes a wife: for she will be thereby entitled to dower, if she survives. *Lit. S. 357.*

So, if a woman takes husband. *Semb. Hard. 463.*

So, if he grants a rent-charge out of the land. *Co. L. 221. b. 222. 1 Rol. 447. l. 50.*

Or, acknowledges a statute or recognizance. *Co. L. 222. a.*

Or, a judgment be against him. *Ibid.*

So, if a condition be, *that he re-enfeof during his life*, and he dies; the condition is broken. *Co. L. 222. b.*

That he re-grant an advowson, and before he does it the church becomes void; the condition is broken. *Co. L. 222. b. Vide ante, (G 5.)*

If a condition be, *that he deliver an obligation*, and he sues and recovers upon it, and then delivers it; it shall be a breach of the condition, for it ought to be delivered in the same plight as it was at the time of the condition created. *R. 1 Rol. 447. l. 30.*

Or, *that he cancel a statute, recognizance, &c.* and he extends it, and then cancels it. *R. Ray. 25. 1 Sid. 48.*

And if, before the condition broken, the other ought to do the first act, he need not do it, when the party has disabled himself to perform the condition: as if the obligor ought to make a new lease upon a surrender of the old; if he levies a fine by which he cannot make a new lease, the condition is broken, tho' the other does not surrender. *R. 5 Co. 21. Cro. El 450. 479. Vide ante, (L 11.)*

(M 4.) Tho' the Disability be afterwards removed.

And if a feoffee, &c. be at any time disabled by himself to perform; the condition shall be broken, tho' the disability be afterwards removed, and the feoffor may re-enter after the removal: as if after a feoff-

a feoffment to a stranger the feoffee takes back an estate to him and his heirs, the feoffor may enter for the condition broken. *Co. L. 221. b. 1 Rol. 448. B.*

So, if the feoffee enters into religion, and is deraigned before the day limited for performance of the condition. *Co. L. 221. b.*

Or, the wife dies. *Ibid.*

Or, a rent-charge determines. *Co. L. 222. a.*

Or, the grantee chuses to have a writ of annuity: by reason of which the land was never charged. *Ibid.*

But if a disability on the part of a feoffor be removed before the time of performance, the condition may afterwards be well performed: as if a condition be *to pay so much to the feoffor or his heirs, before such a day*; if the feoffor be attainted for treason or felony, but before the day the heir is restored, it ought to be paid. *Co. L. 221. b.*

(M 5.) What shall not be a Disability.

But if a condition be *to enfeoff*, and the feoffee be disseised; this is no disability, nor breach of the condition, for he may enter upon the disseisor, and make the feoffment. *1 Rol. 453. l. 40.*

So, if he be disseised by the feoffor or obligee himself. *Ibid.*

So, if during the disseisin the feoffee takes a wife, acknowledges a statute, or recognizance, &c. which dies, or is discharged and then he re-enters; the condition is not broken, for there never was any possibility of charge upon the land. *Co. L. 222. a. R. 2 Co. 60.*

So, if joint-tenants are bound, with condition to convey, &c. and one takes a wife; for she has no title of dower, if her husband does not survive. *Hard. 463.*

So, if a condition be, *not to permit a whore in his house after warning*; and he warns such a woman, but afterwards commands her to stay; this command does not disable the removal, and therefore does not excuse the breach. *1 Rol. 454. l. 25. 8 Co. 91. b.*

If the feoffee be disseised by the obligee or feoffor himself, and he does not enter and make the feoffment within the time limited; it will be a breach.

So, if a condition be, *that the lessee shall drain off water before such a day*, and the lessor enters, and continues in possession till the day; it will be a breach. *R. 1 Rol. 453. l. 45.*

(N) What shall not be a Breach.

BUT if a condition be, *that he permit the executor to take goods*; a verbal denial is no breach, but there ought to be some act, as resistance, shutting up the house, &c. *R. 8 Co. 91. 1 Rol. 430. l. 50.*

If it be, *that he do not molest, vex, &c. any copyholder paying his services*; an entry upon him to beat him is no breach, if he do not oust him of his copyhold. *R. Cro. El. 421. Mo. 402.*

[A. demises lands to B. for 21 years, with proviso of re-entry on breach of any of the covenants; covenant that B. shall not assign, transfer, or set over, OR OTHERWISE DO OR PUT AWAY, this present indenture of demise, or the premises hereby demised, OR ANY PART THEREOF. (N. The words shall not demise, not here.) B. by indenture demises for 14 years; this is not a breach of the covenant or condition. *Per tot.*

tot. curiam. Crusse v. Bugby, T. 11 G. 3. 3 Wilf. 234. 2. What would be a breach? Or, by what means is a tenant to be restrained from acting in this manner?

[Agreement that *A.* shall pay *B.* 8*s.* per week during his life and his wife's, and the survivor, and that *B.* shall not sell newspapers. *B.* dies and his wife sells newspapers, this is not a breach, and *A.* must continue to pay the 8*s.* *Cooke v. Colcraft, H. 13 G. 3. 3 Wilf. 380.*]

[Bond from *A.*, *B.*, and *C.*, with condition that *A.* shall faithfully serve *D.* a brewer, as a broad (*an abroad*) clerk, and pay him all monies received for him. *D.* afterwards takes a partner; *A.* continues in their joint service, receives money on their account, and does not pay it; this is not a breach in the sureties. *Wright v. Russell, H. 14 G. 3. 3 Wilf. 530.*]

Vide ante, (M 1, 5.)

(O) Who shall take Advantage of a Condition broken.

(O 1.) By the Common Law.

IF a condition in deed be broken, none shall take advantage of it by re-entry, but the feoffor or his heirs; for a re-entry cannot be reserved, or given but to the feoffor, donor, lessor, or his heirs. *Lit. S. 347.*

[A right of entry always supposes an estate; and if an estate is granted to a man, reserving rent, and in default of payment, right of entry is granted to a stranger, it is void. *Smith v. Packhurst. Opinion of the twelve Judges in the House of Lords, 1742. 3 Atkyns, 134.*]

And it may be reserved to the heir, where the feoffor himself cannot take advantage of it. *Co. L. 214. b.*

And a guardian in chivalry, or socage, may enter in right of the heir. *Co. L. 215. b.*

So, if a condition to an estate by a corporation be broken, the successor may take advantage of it. *Co. L. 214. b. R. Mo. 52.*

So, the king may enter in right of an infant in his wardship. *1 Rol. 473. l. 47. 50.*

So, if it be annexed to a term for years, the executor or administrator may. *Co. L. 214. b.*

So, an heir, successor, &c. may take advantage of a condition in deed broken in the time of his ancestor, predecessor, or in vacation. *R. Mo. 52.*

But, by the common law, the assignee or grantee of a reversion could not enter for a condition broken; for to prevent all maintenance, &c. the common law did not allow the assignment of a *chose in action*, or of a title to entry, or re-entry. *Co. L. 214.*

So, for a condition broken upon a lease by *cestuy que use*, the feoffees could not enter, tho' they are privy in estate. *Co. L. 215. a.*

Nor the lord by escheat. *Lit. S. 348.*

Nor any assignee in deed, or in law. *Co. L. 215. b.*

Nor a person in remainder. *1 Rol. 473. l. 44.*

Yet, by the common law, if a condition in law annexed to have estate is broken; the assignee of the reversion shall have advantage of it; as, if lessee for life commits a forfeiture. *Co. L. 215. a.*

So, the lord by escheat, and every one who has the land, for a breach in his time. *Ibid.*

So, if by a condition broken, the estate ceases without entry, the assignee shall have advantage of it: as, if a lease for years be, upon condition, *that if such a thing be done, it shall be void*; for by breach of the condition it is absolutely determined. *Co. L. 214. b. 1 Rol. 473. l. 55.*

Otherwise, if a lease for life, &c. be, upon condition, *to be void for non-performance*; for, notwithstanding those words, an estate of freehold will not cease without entry. *Co. L. 214. b.*

Or, if a lease for years be upon condition, *that if such a thing be done, the lessor shall re-enter*; the grantee of the reversion shall not have advantage of it, for he cannot enter. *Co. L. 215. a.*

If a limitation be annexed to an estate, the grantee of the reversion shall take advantage of it; for the estate determines *ipso facto* without entry. *Co. L. 214. b.*

So, none can enter for a condition broken, as bailiff to another, without his command. *R. Mo. 52.*

[An entry by a stranger without authority is good, if it be assented to afterwards, and will support ejectment, if the assent be before the demise in the declaration. *Fitchet v. Adams, P. 13 G. 2 Str. 1128.*]

(O 2.) By the Stat. 32 H. 8. 34.

And now by the *st. 32 H. 8. 34.* a grantee from the king of any reversion, &c. and all other grantees or assignees, &c. their heirs, executors, administrators, and assigns, shall have like advantage against lessee, &c. by entry, &c. as the lessors or grantors themselves.

And therefore, every grantee of a reversion by the king, or a common person, shall take advantage, by this statute, of a condition broken. *Co. L. 215. a.*

So, an assignee of the king's successor, tho' the king only be named. *Ibid.*

So, a grantee of the reversion by bargain and sale inrolled, tho' he is not in from the bargainor in the *per*, but in the *post* by the stat. of uses, yet he is an assignee within the stat. for he claims by the bargainor. *Co. L. 215. a. 3 Co. 62. b. R. Mo. 98. 4 Leo. 29.*

So, if a reversion be granted to the use of another. *Co. L. 215. b.*

So, a grantee of a reversion only for life or years, shall take advantage of a condition. *Co. L. 215. a.*

So, if a devise be for years, rendring rent, upon condition, and by the same will the inheritance is devised to *A.* and his heirs; *A.* shall have the reversion, and shall take advantage of the condition, tho' it was not a reversion in the devisor. *R. 2 Leo. 33.*

So, if a bargainee of a reversion, before attornment, conveys to *B.* to whom the lessee attorns; *B.* shall take advantage of a condition, tho' his grantor could not for want of attornment. *R. 5 Co. 112. b. Cro. El. 833.*

So, an assignee of an assignee *in perpetuum.* *4 Leo. 29.*

But an assignee of a reversion by bargain and sale, by grant, feoffment, or fine, shall not take advantage of a condition broken, before notice of the assignment. *Co. L. 215. a. b. Vide ante, (L 8.)*

And by the *st. 32 H. 8. 34.* an assignee of a reversion shall not take advantage of a condition annexed to an estate-tail; for the statute speaks only of lessees. *Co. L. 215. a.*

So,

So, a lord by escheat, who claims only by act of law, shall not be an assignee within this stat. to take advantage of a condition broken. *Co. L. 215. b.*

Nor a lord of a villein; nor he who enters for *mortmain*. *Ibid.*

So, an assignee of part of a reversion shall not take advantage of a condition; as, if a lease be of three acres upon condition; the assignee of the reversion of two acres shall not enter if the condition be broken; for the condition being entire, cannot be apportioned by the act of the parties, but shall be destroyed. *Co. L. 215. a. R. Dy. 309. 5 Co. 55. b. 1 Rol. 472. l. 35. R. Mo. 98. R. Cro. El. 833. 4 Leo. 27. Vide post. (Q).*

Otherwise in the case of the king; for the king shall have advantage of the breach. *Co. L. 215. a. Dub. Mo. 204. R. 5 Co. 56. a.*

So, a condition may be apportioned by act of law; as, if a man makes a lease of two acres, one of the nature of *Borough-English*, the other at common law, upon condition, and dies, having two sons; each may enter on a breach, into his acre. *Co. L. 215. a. Dy. 309.*

So, it may be apportioned, by the wrong and act of the lessee. *Co. L. 215. a.*

So, an assignee of a reversion shall not take advantage of a breach of every condition, but only of a condition for payment of rent, for not doing waste, or other matter of like nature: for tho' the stat. speaks of (*other forfeiture*), it shall be understood only of other forfeiture of the same nature. *Co. L. 215. b.*

As, of a condition to do a thing incident to reversion, as payment of rent is. *Ibid.*

Or, to deduct out of a rent-charge if he be disturbed. *4 Mod. 82.*

Or, for the benefit of the estate, as is the not doing waste. *Co. L. 215. b.*

So, is a condition for repairing houses, fences, &c. *Ibid.*

For preserving the wood. *Ibid.*

But an assignee shall not take advantage of a condition for payment of a sum in gross. *Ibid.*

Or, for delivery of corn, wood, &c. *Ibid.*

Or, of a condition, that the lessee shall not assign without licence. *Semb. Ray. 250.*

(O 3.) How he shall enter for a Condition broken.

(O 3.) *Where an entry is given till satisfied.*] A condition to a feoffment, &c. may give an entry generally, or a special entry; as, *till he be satisfied, &c.*

If a condition be, *that he shall enter and hold the land till he be satisfied*; he shall have the land only in nature of a distress. *Lit. S. 327.*

If a condition be, *that he shall have the land till he be thereof satisfied*, or words which are *tantamount*; the profits of the land shall be in part of satisfaction. *Co. L. 203. a.*

But where a condition is, *that he shall have the land till he be satisfied the rent to be paid*, without saying *thereof*, or to the same effect; the profits do not go in satisfaction, but shall be taken to his own use, as a penalty to enforce the payment. *Ibid.*

If the profits are in part of the satisfaction; when the rent is satisfied by perception of the profits, the feoffee may re-enter. *Co. L. 203.*

Or, if the rent be satisfied in part by perception of profits, and in part by payment, or by tender and refusal, which amount to payment. *Co. L. 203. a.*

If the profits go in satisfaction, during his perception of them, he shall not have debt for the rent in arrear. *Ibid.*

So, if they do not go in satisfaction, where the estate, to which the condition was annexed, was for life, &c. for the freehold continues in lessee for life, and then debt does not lie for the rent. *Ibid.*

If he, who enters till satisfied by the profits, be interrupted in the perception of the profits by the act of God, as by wildfire, an inundation of the sea, &c. which happens without his default; he shall (beyond the time in which he might have been satisfied if there had been no interruption) hold till he be satisfied. *R. 4 Co. 82. b.*

So, if he be interrupted by the feoffee himself, he may hold over, or take his remedy by action against him: for he shall not have advantage of his own wrong. *R. 4 Co. 82.*

But where he is prevented by his own negligence or default, as by the entry of a stranger, by enemies of the king, by ignorance of the condition, &c. he shall not take the profits beyond the time in which he might be satisfied. *R. 4 Co. 82. Sir And. Corbet.*

If rent be granted with a condition, that if it be in arrear, the grantee, his heirs and assigns may enter and hold the land till satisfied by the profits; the assignee may enter and hold till satisfaction. *R. 1 Sand. 112.*

And the grant is good, tho' the deed be not inrolled; for this uncertain interest may attend a certain and fixt estate. *R. 1 Sand. 112. 1 Sid. 344.*

So, if the grant be by deed with a covenant to levy a fine, which is levied of the land accordingly; the assignee of the rent shall take advantage of the condition, which shall be transferred with the rent, tho' it was only a possibility. *R. 2 Rol. 48. l. 45.*

But if a man purchases the manor of *D.* and has other land conveyed as a collateral security, to the use of the vendor and his heirs till the purchaser be evicted by his wife, and then to the use of the purchaser, his heirs and assigns, till satisfied the damage had by such eviction; if he assigns the manor of *D.* the assignee, being evicted, cannot enter into the other land: for the use being contingent, was not assignable before it happened. *R. 2 Rol. 49. l. 5.*

(O 4.) *What interest he has.*] He who enters, has only the pernancy of the profits till satisfied, and no certain interest; for the freehold continues in the feoffee, &c. *Co. L. 203. a.*

Tho' the condition be, *that the feoffor, his heirs and assigns, enter, &c.* *R. 1 Sand. 112. 1 Sid. 344. Ray. 136. 158.*

And if he enters his interest goes to his executors. *R. 1 Sid. 223. 262. 344. 5. D. Al. 45.*

But he who enters, may maintain an ejectment; for he has an interest to make a lease for trial of the title. *R. 1 Sid. 345. 1 Saund. 112.*

(O 5.) *Where this entry is general.*] If a condition upon a feoffment,

ment, or other estate of freehold, be, *that for non-performance the feoffor, &c. shall enter*; if the condition be broken, the estate is not defeated, generally, till entry, or claim: and therefore, if he can, he ought to make an actual entry. *Co. L. 218. a.*

And if the estate lies in grant, as an advowson, rent, reversion, &c. he ought to make a lawful claim. *Co. L. 218. a.*

So, tho' the condition be, *that for non-performance the estate shall be absolutely void*; for an estate of freehold cannot regularly cease, without entry, or claim. *Co. L. 218. a. 2 Co. 50. 2 And. 8.*

So, tho' the condition be upon a bargain and sale, which passes only an use, which might cease at the common law without a claim; for now, by *st. 27 H. 8.* the possession is executed. *R. 2 Co. 53. b.*

Yet in case of necessity, there need not be an entry or claim: and therefore, if a lease be for five years, upon condition, *that if the lessee within two years pays 20l. he shall have the fee*, and livery is made, by which the lessee has a fee conditional: if he does not pay, the fee shall be reverted without entry, for he cannot enter during the term. *Lit. S. 350.*

So, if a rent be granted out of his land, upon condition; if the condition be broken the rent shall be extinct, without claim, for he need not claim upon the land which he has in his own possession. *Co. L. 218. a.*

So, if a feoffment be upon condition, and before the time of performance, the feoffee leases for years to the feoffor, and then the condition is broken; the feoffor, being in possession, cannot enter. *Ibid.*

So, if a covenant be to stand seised to the use of himself for life, remainder over with power of revocation: if he revokes, there needs no entry or claim. *Co. L. 218. b. R. 1 Co. 174.*

By whom entry may be made, *vide Claim, (B 2.)*

(O 6.) He shall be in his first Estate.

He who enters for a condition broken, regularly shall have the land in his first estate. *Co. L. 202. a. 1 Rol. 474. l. 17.*

And therefore, if tenant for life makes a feoffment, and enters for the condition broken; he shall be seised for life, the reversion as before. *1 Rol. 474. l. 27.*

So, if he enfeoffs him in reversion, upon condition. *1 Rol. 174. l. 30.*

So, if a man grants, or devises for life, upon condition, remainder over; if it be a good condition, the entry for the condition broken will destroy the remainder. *1 Rol. 474. l. 40. 45. Cont. Dy. 127. Acc. 29 Aff. 17. R. acc. 10 Co. 41. b. 1 Rol. 472. l. 40. 45.*

And therefore, a condition annexed to an estate for life, where a remainder over is limited, shall be taken as a limitation. *Vide post. (T).*

But otherwise will it be in a case of necessity: as, if a man seised in right of his wife, makes a feoffment upon condition, and his heir enters for the condition broken, his estate immediately ceases, and shall be vested in the wife. *Co. L. 202. a.*

If *cestuy que use* made a feoffment before *st. 27 H. 8.* upon condition; and entred for a breach after the stat. he would be seised of the estate, whereas before he had only the use. *Co. L. 202. a.*

If tenant in special tail enfeoffs upon condition, and his wife dies, and then he enters for a breach; he shall be only tenant in tail after possibility. *Co. L. 202. b.*

So, he shall not have it in his first estate as to collateral qualities: as, if tenant by *homage ancestrel* makes a feoffment upon condition, and enters for a breach; he shall not hold afterwards by *homage ancestrel*, for the prescription was interrupted. *Ibid.*

So, if a copyhold escheats, and the lord makes a feoffment of it upon condition, and enters for the breach. *Ibid.*

If tenant for life makes a feoffment, and enters for the condition broken, it shall be subject to a forfeiture. *Ibid.*

So, if a grantee of a ward by the king grants to the ward himself for 1200 *l.* to be paid at his full age, his wardship and marriage for ever, upon condition, that if he dies within age or before the 1200 *l.* paid, the grant shall be void; if he dies within age, the wardship and marriage are not revested. *R. Sav. 79, 80.*

Entry for a condition broken defeats the estate, to which the condition was annexed, to all intents; and therefore, if the feoffee upon condition dies, and then the feoffor enters for the condition broken, the wife of the feoffee shall not be endowed. *1 Rol. 474. l. 10.*

(P) What shall be a Dispensation.

IF after a condition broken annexed to an estate of freehold, and notice of it, the feoffors accept the rent due at a subsequent day; it shall be a dispensation of the forfeiture, for he allows the estate to have continuance. *Co. L. 211. b. Per three J. Cro. El. 553. 572. Vide Copyhold, (M 8.) Vide Forfeiture, (A 11, 12.)*

So, if a condition upon a lease for years be, *for non-payment of rent to re-enter*; the acceptance of rent at a subsequent day, is a dispensation. *Cro. El. 553. 572.*

So, if he restrains, or brings an assise for rent due at the same day, or a subsequent day. *Co. L. 211. b. 1 Rol. 475. l. 25.*

Or, for rent incurred at a day precedent: for he affirms the estate to have continuance. *1 Rol. 475. l. 30.*

So, if a condition be *that he shall not assign*; acceptance of rent from the assignee will be a dispensation. *R. 2 Cro. 398.*

If it be alleged, that he knew it, it is sufficient; for he had not notice, it shall come of the other part. *R. 2 Cro. 398.*

But if a condition be *to do a collateral thing*; acceptance of rent before notice of forfeiture, is not a dispensation. *R. 3 Co. 65. Cro. El. 528.*

So, if a condition be *to pay money*; acceptance of rent due before, is not a dispensation.

So, if he afterwards accepts the rent, by the non-payment of which the condition was broken, and gives an acquittance for it. *Cq. L. 211. b.*

So, if by a condition broken the estate absolutely ceases; acceptance of rent, due at the same, or a subsequent day, does not affirm it: as, if a lease for years be upon condition *for non-payment to be void*. *R. 1 Rol. 475. l. 35.*

Tho' a lease be by the king, and he afterwards accepts the rent in the *Exchequer* upon record. *R. 1 Rol. 475. l. 40. Cro. El. 221, 2 Leo. 134 1 And. 303. Adm. Mo. 294. Poph. 25. 53. So,*

So, if a condition be, *that he do not assign without licence*, and after notice of such assignment, the lessor accepts the rent from the assignee. *R. 1 Rol. 476. l. 5. Cro. Car. 512.*

If a licence be to alien; the death of him who gave it, before alienation, is not a countermand. *Co. L. 52. b.*

(Q) What Act destroys a Condition.

IF after a lease upon condition, the lessor grants the reversion of part of the land, this destroys the condition. *Vide ante, (O 2.)*

So, if the lessor releases the condition.

So, if a feoffee upon condition makes a lease for life, remainder to B. and the feoffor releases the condition to the lessee only; the whole condition is gone. *Co. L. 297. b.*

So, if a condition be to do such an act, and the lessor discharges him of part; the whole condition is destroyed: as, if a condition be *to plow his land, or build his house*, and he discharges him of part. *1 Rol. 471. l. 47. 52.*

So, if a condition be *to go with B. and C.*, and he discharges him as to B. *1 Rol. 471. l. 50.*

If a condition be, *that he do not demise any part without licence*; if he licenses as to any part, he may demise all the residue, without licence. *1 Rol. 471. l. 42. 2 Cro. 102. R. 4 Co. 120. Cro. El. 816.*

Or, *that he and his assigns do not demise*; if he assigns by licence, the assignee may afterwards demise, without licence. *R. 1 Rol. 471. l. 35. 4 Co. 120. a. Cro. El. 816.*

Or, *that none of the lessees demise without licence*, and he gives licence to one; the other lessees may demise without licence. *1 Rol. 472. l. 7. 4 Co. 120.*

So, if a lessor gives licence; the lessee may use it after a grant of the reversion. *R. 2 Cro. 102.*

Or, the death of the lessor. *Co. L. 52. b.*

So, if a condition be, *that he shall assign only to his wife or brother*; if he assigns to the brother, he may afterwards assign to another. *R. 2 Cro. 38. Per two J. three cont. Dy. 152. But the opinion of the two judges allowed. 4 Co. 120. b.*

If a lease be upon condition to husband and wife, *that if it comes to any other hand than their own, and their issues, the lessor shall re-enter*; if the husband dies, and the wife takes another husband, the lessor shall re-enter. *Dub. Mo. 21.*

If a man leases for years upon condition, and afterwards leases by indenture for the same term to another, to commence immediately; this does not destroy the condition, for the second lease is good only by estoppel. *1 Rol. 472. l. 50.*

(R) Condition in Law; what is.

A Condition in law is that, which the law implies without any exprefs words of the party. *Co. L. 232. b.*

As, to the estate of tenant by the curtesy, in dower, after possibility, for life, for years, by statute-merchant, staple, *elegit*, guardian, &c. a condition is annexed by the law, that they do not alien in fee, &c. *Co. L. 233. b.*

To every estate, that it be not aliened in *mortmain*. *Co. L.* 233. *b.*

So, to the estate of tenant by the curtesy, in dower, for life, years, &c. a condition is annexed, that they do not commit waste. *Ibid.*

So, to a grant of an office of a parker, steward, bedel, bailiff of a manor, and other offices, a condition is annexed by law, that he do that which to his office appertains. *Lit. S.* 378, 379.

So, by the *stat. 5 Ed. 6.* 16. to offices which concern the administration or execution of justice, a condition is annexed, that he do not purchase, or sell his office. *Co. L.* 234. *a.* *Vide Officer*, (K 1.)

So, to all franchises a condition is annexed by law, that they be not misused. *Mir. ch. 5. f. 4.* 2 *Inst.* 223. *D. Quo. War.* 11, 12.

Who are bound by a condition in law. *Vide ante*, (A 10.)

(S) What shall be a Breach of a Condition in Law.

(S 1.) Dereliction of an Office.

WHEN an alienation by tenant by the curtesy, in dower, for life, years, &c. shall be a forfeiture, *vide Forfeiture*, (A 1, &c.)

When an alienation in *mortmain*, *vide Capacity*, (B 2, &c.)

When waste shall be a forfeiture, *vide Waste*, (F 1, 2.)

In all cases where an officer relinquishes his office, and refuses attendance, he forfeits his office. *Co. L.* 233. *b.* *R. 9 Co.* 50. *b.* *Vide Officer*, (K 2.)

So, if an officer has a sentence against him in the star-chamber for bribery, and that he be incapable of any judicial office; his office is not lost by the sentence, for if he be pardoned, he may afterwards execute it. But if, after sentence, and before the pardon, he refuses attendance; it is a forfeiture. *R. Cro. Car.* 55.

(S 2.) Abusing his Authority.

So, in all cases where an officer acts contrary to the duty of his office; it shall be a forfeiture: as, if a parker kills deer, &c. without warrant. *Co. L.* 233. *b.* *R. 1 And.* 29.

Or, destroys the *vert*; as by cutting down, or felling of trees, wood, underwood, &c. *Co. L.* 233. *b.* 1 *And.* 29. *R. Mod.* 707, 787. 9.

Or, pulls down the lodge, or other houses of the park. *Co. L.* 233. *b.* 1 *And.* 29.

Or, surcharges the park by agistment, that the deer have not sufficient herbage. *R. Mo.* 787.

So, if a parker refuses to execute the warrant of his master, or to permit it to be executed. *Per two J. one cont. Mo.* 9.

If by stat. an auditor be bound to shew his account before *Hilary* term annually, and does not do it; it shall be a forfeiture. *Dy.* 197. *b.*

So, if an officer neglects that which by his patent he ought to do *sub poena forisfacturae*; as, if he does not account, or pay money due upon an account, at the time appointed by his patent. *R. Dy.* 211. *a.*

If he, who has an office of the custody of a house of the king, denies him who has the inheritance to inhabit there; it shall be a forfeiture. *R. 2 Cro.* 18. *Mo.* 787.

Otherwise, if his servants do it of their own head. *R. 2 Cro.* 18. *Mo.* 787.

So,

So, in all public offices, which concern the administration of justice, *non-user*, of itself, is a forfeiture. *Co. L. 233. a. Vide Liberties, (C 1, 2.)*

As, absence in a philizer for two years. *Dy. 114. b.*

In a town clerk. *1 Sid. 14. Vide Franchises, (F 27.)*

But absence involuntary, or for a reasonable cause, is not a forfeiture; as, if a serjeant at arms makes a deputy by the king's licence by *parol* only. *R. 9 Co. 99.*

So, in private offices, *non-user*, if it be accompanied with any damage to the lord or master, is a forfeiture: as, if a parker be absent for two or three days, and in his absence deer, &c. are killed. *Co. L. 233. a.*

So, a voluntary neglect to attend, without a reasonable excuse of the absence, is a forfeiture of the office of serjeant at arms to the lord chancellor. *R. 9 Co. 99. Dy. 198. a.*

So, non-attendance in his month of waiting, is forfeiture of the office of clerk of the signet. *D. 1 Sid. 81.*

And, if the office was granted in reversion, non-attendance when the office is void, without notice of the death of the former officer. *D. 1 Sid. 81.*

So, a private officer, who has only a certain fee to be paid by his master, may be discharged *ad libitum*. *Co. L. 233. a.*

But, generally, *non-user* of a private office, without a special damage, is not a forfeiture. *Ibid.*

So, a private officer cannot be discharged *ad libitum*, where he has profits belonging to his office, besides his fee; for a grantor cannot defeat his own grant: as, a steward of a manor, &c. *Co. L. 233. b.*

So, he cannot be discharged *ad libitum*, where his fee is not paid by the lord, but to be allowed out of the profits of his office. *Ibid.*

What charges, &c. shall be avoided by an entry for a forfeiture. *Vide ante, (O 6.)*

(T) Limitation; what shall be.

SO, if an estate be granted under a limitation, there is a condition in law, that if the contingency upon which the estate is limited happens, the estate determines.

As, if an estate be granted to a woman *durante viduitate*. *Co. L. 234. b. Jon. 58. [Vide Ambler, 209.]*

Or, *dum casta & sola vixerit*. *Co. L. 234. b.*

So, *dummodo, quamdiu, donec, quousque*, &c. are words of limitation. *Co. L. 235. a. 10 Co. 42. a.*

So, where an estate is limited by way of use, it shall be a conditional limitation; tho' it would not be a condition by the common law. *Pol. 78.*

If a man, by his will, devises land to his heir, upon condition, that he pays, or does such an act, &c. and for non-payment, &c. devises it over; this shall be taken as a limitation, tho' there are express words of condition; for otherwise, the heir, who ought to enter for the condition broken, will take advantage of his own default. *R. 1 Rol. 411, l. 30. 45. R. Ray. 237. R. 2 Mod. 7. Vide Ambler, 230.*

So, if an estate be devised for life, or years, upon condition, remainder over in fee; the words of condition shall be taken as a limitation;

ation; for otherwise, by entry for the condition broken the remainder will be destroyed. *Cont. 10 Co. 40. b. Per Periam, acc. 1 Leo. 283. R. 2. Leo. 38. Ow. 8. 55. R. Cro. El. 919. 833. R. 2 Cro. 592. R. 1 Vent. 203. 1 Mod. 86.*

[So, if testator devise his estate to his wife for life, and after her death to such child as she was then supposed to be *enscint* with, and to the heirs of such child for ever, provided that if such child as shall happen to be born shall die before the age of 21 years leaving no issue of its body, the reversion over: no child is born, this is a limitation of a remainder. *1 Wilf. 105, 106.*]

[So, if a term be bequeathed to *A.* and his lawful heirs, and if he die and leave no lawful heir, then to *B.* the limitation to *B.* is good; for by "lawful heirs" is apparently meant "heirs of the body;" and "leaving no lawful heir" must be confined to leaving no issue at the time of his death. *2 Term Rep. 720.*]

[If *A.* on the marriage of his eldest son *B.* settles a freehold lease held for the life of *B.* and others, in trust to permit *B.* to enjoy for life, then his intended wife for life, then, after being subject to a charge for younger children, in trust for the heirs-males of the body of *B.* and in default for the heirs-males of the body of *A.* and in default for the right heirs of *A.*; this limitation to the heirs-males of the body of *A.* is not a contingent remainder, but a limitation of the estate; and *B.* thus being in the nature of tenant in tail, and also tenant for life, may, on the death of his wife and son, bar the entail. *Forster v. Forster, H. 1741, 2 Atkins, 259.*]

[If *A.* devises his real estate to his heir at law *B.* and his heirs, on express condition that in three months after *A.*'s death he execute to his trustee a release, if not, to *C.*, and *B.* dies in *A.*'s life-time, the estate goes to *C.* and not to the heir at law; for this is not a strict condition but a conditional limitation. *Avelyn v. Ward, H. 1749, 1 Vezey, 420.*]

So, a devise of a house to *A. provided that if he does not inhabit there, it shall be to the lord*, will be a limitation. *Dal. 117.*

So, express words of condition shall be taken for a limitation, if the nature of the case requires it. *Eq. Abr. 105.*

Yet, if a remainder is not limited upon the non-performance of the thing to be done by the condition, it shall be taken as a condition, and not as a limitation. *Semb. 1 Rol. 411. l. 15. 412. l. 7.*

So, if an estate be to *A. paying, &c. and if he do not pay, to B. and if he do not perform, to the mayor, &c.* the second limitation will be void; for it will be a possibility after a possibility. *Semb. Cro. Car. 577.*

So, if a freehold or inheritance be devised with remainder over, upon condition, *that if he do not go to Rome, &c. his estate shall cease, and shall go to him in remainder*; it cannot be taken as a limitation, for a freehold cannot cease. *Jon. 58.*

[If a man devises land, and money to be laid out in land, to trustees, on trust and to the use of *A.* in strict settlement, with remainders over in strict settlement; proviso, "that when the person who for the time being would (if testator had not otherwise directed) have been intitled in possession as tenant for life or in tail, shall be under twenty-six, the trustees shall enter and receive the rents and interest, and allow certain maintenances to such tenant for life, or in tail, the rest to accumulate, and be laid out in lands to the same uses;"

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"uses;" and *A.* attains twenty-six, marries, dies leaving his wife enceinte of *B.* the trustees take no estate in the premises on the birth of *B.* *Lade v. Holford*, T. G. 3. 3 *B. M.* 1416.]

Condition in Terrorem.

Vide Chancery, (2 Q 6.—3 Z 6, 7.)

Vide more of Condition, in *Chancery*, (2 Q 1, &c.—4 D 1, &c.—*Estates*, (A 6, &c.)—*Obligation* (E).—*Uses*, (K 4.)

CONDUCT.

Vide Admiralty, (E 8.)—*Prerogative*, (B 5.)

CONFERENCE.

Vide Parliament, (G 24. 29.)

CONFESSION.

Vide Indictment (K).—*Pleader*, (G 3.—Q 5.—Y 2.—2 W 15.)

CONFIDENCE.

Vide Chancery, (4 W 1, &c.)

CONFIRMATION.

(A) Confirmation in Fact; by what Words it shall be.

CONFIRMATION is when a man confines a defeasible estate, or enlarges a particular estate. *Co. L.* 295. b.

And it is expressed, or implied. *Ibid.*

By a confirmation express, or in fact, a voidable estate shall be confirmed, so that it cannot be avoided; as, if a disseisor confirms the estate of the disseisor. *Vide Lit. S.* 519.

And there needs not the word *confirmavi*; for if a man uses the word *dedi*, or *concessi*, that amounts to a confirmation. *Lit. S.* 531.

So, *demisi*. *Co. L.* 301. b.

So, if a man says, *volo quod A. habeat* such land; that amounts to a confirmation. *Ibid.*

And a confirmation shall be good by sealing the deed, without livery, or other circumstance. *Semb. Sav.* 49.

So, if patron and ordinary give licence to a parson to make a grant; that amounts to a confirmation. *Co. L.* 300. b.

So, if parson and ordinary demise for years to the patron, who grants it over to *B.* This assignment amounts to a grant and confirmation also. *Co. L.* 302. a, 2 *Rol.* 9.

So, if a disseisor grants a rent out of the land to the disseisor, who assigns it, and afterwards re-enters; that amounts to a grant and confirmation of the rent by the disseisor. *Co. L.* 302. a.

So, if a disseisor grants the land to *B.* for life, or in tail, remainder to the disseisor, who grants over this remainder, to which the tenant for

for life attorns ; that amounts to a confirmation by the disseisee of the remainder, and also of the particular estate. *Co. L. 302. a.*

So, if the disseisee joins in a feoffment, &c. with the heir of the disseisor ; that amounts to a confirmation by the disseisee. *Lit. S. 534.*

So, if a donee in tail grants a rent in fee to him in remainder, who assigns it over ; that amounts to a confirmation of the rent, if the donee dies without issue. *Semb. 1 Rol. 482. l. 45.*

So, if a donee makes a lease not warranted by *§. 32 H. 8.* and dies, and the issue accepts the rent ; that amounts to a confirmation. *Vide Estates, (B 24. 32.)*

So, in every case, where a lease is only voidable ; as by an abbot, bishop, &c. *3 Co. 65. a.*

But a surrender does not amount to a confirmation. *Co. L. 301. b.*

So, if a man bargains and sells the reversion to lessee for years ; that does not amount to a confirmation to enlarge his estate, if the bargain and sale be not inrolled. *Dal. 37.*

So, if there be lessee for years, remainder to *A.* for life, the reversion to *B.* in fee ; a charter of feoffment and livery, by *B.* to the lessee, being void as a feoffment, does not amount to a confirmation to enlarge the estate of the lessee. *R. 1 Rol. 482. l. 40.*

So, if a lease be absolutely void, acceptance of rent afterwards does not amount to a confirmation : as if a lease be, upon condition for non-payment to be void. *Vide Condition (P).*

So, if a parson, vicar, or prebendary leases for years, and dies, and the successor accepts the rent ; it is not a confirmation, for the lease was void by his death. *3 Co. 65. a. Vide post. (D 1.)*

If a bishop makes a lease, which needs confirmation by the dean and chapter, and dies before confirmation, and the rent be accepted by the successor ; the lease shall not be affirmed. *2 Rol. 161.*

What act by a woman, or one at full age shall be a confirmation of an estate made during coverture or nonage. *Vide Baron and Feme, (S 1.)—Enfant, (C 6.)*

(B) How a Confirmation shall enure.

(B 1.) When confirming the Estate enures to the whole Estate.

IF a disseisee confirms the estate of the disseisor, it is good for ever. *Lit. S. 519.*

Tho' the confirmation was only for life, or for years, or for a day, &c. for he confirms his estate, which was a fee-simple. *Lit. S. 519, 520.*

So, if a disseisor make a gift in tail, and the disseisee confirm the estate of the donee only for life, &c. this enures to confirm the whole estate-tail. *Co. L. 296. b.*

So, if an estate of freehold be confirmed in part, or for a time, the whole estate is confirmed, for it is entire. *Co. L. 297. a.*

So, if an estate be for years, and he confirms the demise, or lease, or estate of the lessee, for part of the term ; the addition of *part of the term* is void, for the demise or estate was confirmed before. *Ibid.*

So, if a dean and chapter, &c. confirm a lease only for part of the term. *R. 1 And. 47.*

So, if a disseisor makes a joint estate to *A.* and *B.* and the disseisee confirms the estate of *B.* ; this enures to *A.* for the estate is confirmed, which was joint. *Lit. S. 522. Co. L. 297. b.*

So,

So, if the estate of one joint-tenant be confirmed, that enures to his companion. *Lit. S. 522.*

Or, if one joint-tenant confirms the estate of the other, it remains joint. *Lit. S. 523.*

If a disseisor makes a lease to *A.* and *B.* and to the heirs of *B.* and the disseisee confirms the estate of *B.* for life; this enures to *A.* and also to the fee of *B.* for he had the whole estate of the fee-simple in him. *Co. L. 297. b.*

So, if a disseisor makes a lease for life, &c. remainder to *B.* in fee, and the disseisee confirms the remainder; this enures to the benefit of the particular estate; for if this should be defeated, the remainder would be also defeated. *Lit. S. 521.*

So, if he makes a lease for life, reserving the reversion to himself; a confirmation of the reversion enures to the lessee for life, for by entry upon him, the reversion would be destroyed. *Co. L. 298. a.*

(B 2.) When it enures only to Part.

But sometimes by apt words a confirmation goes only to part of an estate: as if a disseisor, or lessee for life, &c. makes a lease for 100 years; if the disseisee or lessor does not confirm his estate or lease, but confirms the land to the lessee for fifty years, it is good for so many years. *Co. L. 297. a.*

So, if a lease be of forty acres, he may confirm it for twenty acres. *Ibid.*

So, if a disseisor makes a joint estate to two, and the disseisee confirms only the land to one; he has the sole estate in the whole. *Lit. S. 522.*

So, if a disseisor makes a lease for life, &c. remainder to another; a confirmation of the estate of the lessee does not enure to him in remainder. *Lit. S. 521.*

Or, if the remainder be to the same person: as if a disseisor gives to *B.* in tail, remainder to the heirs of *B.* a confirmation of the estate-tail by the disseisee does not enure to the remainder. *Co. L. 297. a.*

(B 3.) When it enlarges the Estate.

If a lessor confirms the estate of a lessee for years, *habend'* the said land to him for life; this gives to him an estate for life. *Lit. S. 532.*

So, if he confirms it, *habend'* the land to him and the heirs of his body, or his heirs, generally; he has an estate-tail, or in fee. *Lit. S. 533. Co. L. 299. a.*

So, if a man seised of a rent in fee, grants it for life, and afterwards confirms the estate of the grantee, *habend'* the rent to him and his heirs: the grantee has a fee. *Lit. S. 549.*

But if a man confirms the estate of a lessee for life, &c. *habend'* his estate to him and his heirs; this does not enlarge the estate, for the estate for life cannot go to his heirs. *Co. L. 299. a.*

So, if a rent be granted *de novo* for life, and the grantor confirms the estate of the grantee to him and his heirs; this does not enlarge his estate. *Lit. S. 548.*

And where a confirmation enlarges the estate, there ought to be privity

privity between him who confirms, and him who takes the confirmation. *Co. L. 296. a.*

And therefore, a confirmation by a lessor to a lessee for life and a stranger, is void to the stranger. *1 Rol. 482. l. 27.*

So, a confirmation to enlarge an estate, by him who has only a right to the reversion, is not good. *1 Rol. 482. l. 20.*

But if a woman, lessee for life, takes husband; the lessor, by confirmation to the husband, may enlarge his estate; for there is a sufficient privity. *Co. L. 299. a.*

(B 4.) How a Confirmation, which enlarges an Estate, operates.

If a husband has an estate for life in right of his wife, a confirmation to the husband and his heirs gives him the fee, after the death of his wife. *Co. L. 299. a.*

If the confirmation be to husband and wife for their lives; this gives to the husband a remainder, or interest for his life, after the death of his wife. *Lit. S. 525.*

If it be to husband and wife, and their heirs; they have a joint fee-simple. *Co. L. 299. b.*

If an estate was granted to husband and wife, *habend'* one moiety to the husband, and the other moiety to the wife, and a confirmation be to the husband and wife and their heirs; the husband has one moiety in fee, and the husband and wife are joint-tenants of the fee in the other moiety. *Ibid.*

If a woman, lessee for years, takes husband, and a confirmation be to them for their lives; they are joint-tenants for life, for the term is merged in the freehold. *Lit. S. 526.*

So, usually the confirmation enures according to the quality of the estate: and therefore, if there are tenants in common for life, and a confirmation be to them and their heirs; they have the fee in common. *Co. L. 299. b.*

If a lease be to *A.* for life, remainder to *B.* for life; a confirmation to them and their heirs, gives a moiety to *A.* for life, remainder to *B.* for life, remainder to *A.* in fee; and the other moiety to *A.* for life, remainder to *B.* in fee. *Ibid.*

If a gift in tail be to *A.* and *B.* a confirmation to them and their heirs, gives the fee to them in common: for it follows the inheritance in them before, which they had in common. *Ibid.*

(C) When a Confirmation is effectual.

(C 1.) Tho' it wants Privity.

A Confirmation which does not enlarge the estate, shall be good, though there be no privity: as if lessee for life demises for years, and the lessor confirms the estate of the lessee for years. *Lit. S. 516, 517.*

Or, a disseisee confirms a lease by the disseisor. *Lit. S. 518.*

If an infant leases for years to *B.* who grants the land for part of the years to another, and the lessor at his full age confirms it. *Lit. S. 547.*

Otherwise, where a confirmation enlarges the estate. *Vide ante,* (B 3.)

Or, abridges the services. *Vide post.* (D 3.)

(C 2.) Tho' the Estate is gone, out of which the Grant confirmed was derived.

So, if a disseisor grants a rent-charge, &c. and the disseisee confirms it, and afterwards enters upon the disseisor; the rent remains, tho' the estate out of which it issued be gone. *Lit. S.* 527. *Co. L.* 300. *a.*

So, if the heir of the disseisor grants a rent, and the disseisee confirms it, and afterwards recovers the land; tho' the entry of the disseisee was not congeable at the time of the confirmation. *Co. L.* 300. *a.*

So, if feoffee upon condition grants a rent, which [the feoffor confirms, and afterwards enters for the condition broken. *Ibid.*

So, if a lessee for life grants a rent in fee, and the lessor confirms it; the rent remains tho' the estate for life be determined. *Lit. S.* 529. *1 Rol.* 483. *l.* 25. 30.

So, if lessee for life upon condition, grants it, and afterwards the condition is broken. *Co. L.* 301. *a.*

But if the person who confirmed had only a particular estate, his confirmation determines with his estate: as if a patron, being only tenant for the life of *B.*, confirms a lease of the parson, the confirmation is gone when *B.* dies. *2 Rol.* 9.

(D) When a Confirmation is not good.

(D 1.) If it be of a void Thing.

BUT a confirmation of a void thing avails nothing: as if *B.* takes from another his villein in gross, who confirms to *B.* his estate in his villein; it is of no avail, for he had not any estate in him. *Lit. S.* 541.

If a bishop in *Ireland de facto*, where there is another rightful bishop alive, leases for years, and the lease is confirmed by the dean and chapter; yet the lease is not good after the death of the lessor. *R.* 2 *Cro.* 553, 4.

So, if a disseisee, before *Mich.* confirms the estate of a lessee by a lease by the disseisor, made to commence after *Mich.* for the lessee then had only *interesse termini*. *Co. L.* 296. *b.*

If a bishop collates to a prebend, and dies, and before induction the king confirms it; it is void, for he had nothing in the prebend till induction. *1 Rol.* 483. *l.* 15. *Vide post.* (D 5.)

So, a confirmation of a void lease does not make it good. *Dy.* 239. *b.* *Vide Baron and Feme*, (S 1.)—*Enfant*, (C 7.)—*Ante* (A).

Yet by a confirmation by act of parliament, a thing void shall be made effectual: as a void patent. *1 Rol.* 483. *l.* 5. *Semb. cont.* where a void custom was confirmed. *Hard.* 41. where the parliament confirms only a void act. *Pl. Com.* 399.

Otherwise, if the parliament confirms the thing done; as, a grant, lease, attainder, &c. which would be void without such confirmation. *Pl. Com.* 399.

[So, where the king's intention to grant, appears, it shall be good, though it be contained in a confirmation of a void grant. *1 Ld. Raym.* 300.]

(D 2.) Does not give collateral Qualities.

So, a confirmation gives nothing but the right to that, which he to whom the confirmation is made, had before: as if the lord confirms the estate of his tenant, yet his seignior remains. *Lit. S. 535.*

So, if he who has a rent, common, &c. out of land, confirms the estate of the terre-tenant; his rent, common, &c. remains. *Lit. S. 536, 537.*

So, a confirmation does not give any collateral qualities: and therefore, if an husband alone levies a fine, where husband and wife are seised in special tail, remainder to the husband in fee, and the consuee confirms the estate of the wife; this does not make her estate descendible to the issues, who are barred by the fine. *R. 9 Co. 142.*

(D 3.) Nor extinguishes a Right, &c. in Suspense.

So, a confirmation does not give, nor extinguish a right or interest in the confirmer, which was suspended: as, if the disseisee and a stranger disseise the heir of the disseisor, and the disseisee confirms the estate of his companion; this does not extinguish his right, which was suspended. *Co. L. 298. b.*

So, if he who has a rent, &c. out of land, and a stranger disseise the terre-tenant, and the grantee of the rent confirms the estate of the stranger, and afterwards the disseisee re-enters; the rent is revived, for it was suspended at the time of the confirmation. *Ibid.*

So, by a confirmation a man cannot make a reservation to himself: as, if a lord confirms the estate of his tenants, he cannot reserve new services. *Lit. S. 539.*

If queen *Elizabeth* grants a college two manors rendring rent, and her successor confirms the grant rendring the same rent; it shall not be a double rent, for a rent upon a confirmation is void, tho' it be in the case of the king. *R. Hard. 167.*

But by confirmation a man may abridge his former services: as, if the tenant holds by fealty and 20*s.* rent; the lord may confirm his estate, to hold only by 12*d.* rent. *Lit. S. 538.*

Or, to hold by *frankalmoigne*; for this is a discharge of the other services, rather than a reservation of a new service. *Lit. S. 540.*

Yet, to such a confirmation as abridges services, privity is necessary. *Co. L. 305. b.*

And therefore, if there be lord, mesne, and tenant, the lord cannot abridge the services of the tenant. *Ibid.*

So, if a man has a rent-charge, or common in the land of another, by confirmation to the terre-tenant, his rent or common shall not be diminished, or abridged. *Co. L. 305. a.*

(D 4.) So, a Confirmation is not good, when made by him who has nothing.

So, a confirmation by him, who has nothing at the time, is worth nothing. *1 Rol. 482. l. 8.*

As, if tenant in tail and the issue in tail, join in a grant of the next avoidance, and the tenant in tail dies; this is not a confirmation by the issue in tail, for he had nothing at the time. *R. 1 Rol. 482. l. 19.*

(D 5.) So, it shall not have Relation to the Prejudice of another.

So, a confirmation shall not have relation to the prejudice of another: as, if a parson makes a lease, and afterwards the patron being bishop grants the next avoidance to *A.* and it is confirmed by the dean and chapter, and afterwards the lease is by them confirmed, the presentee of *A.* shall avoid the lease, for the grant to *A.* was before the confirmation of the lease. *R. Hob. 7.*

So, the subsequent presentee shall avoid it; for being avoided by the presentee of *A.* it shall be void as to all his successors. *Hob. 7.*

Vide Chancery, (2 R.)

CONIES.

Vide Justices of Peace, (B 48.)

CONSCIENCE.

Vide Chancery.

CONSIDERATION.

To raise an *Assumpsit.*

Vide Action upon the Case upon Assumpsit, (B 1, &c.)

To raise an Use by Bargain and Sale.

Vide Bargain and Sale, (B 11.)

— by Covenant to stand seised.

Vide Covenant, (G 3, &c.)

Vide also Agreement, (B 2, 3.) — Chancery, (2 C 7, 8, &c. — 2 T 10. — 4 D 4, 5. 7.) — Pleader, (C 52, &c.) — Uses, (K 1.)

CONSIMILI CASU.

Vide Dum fuit infra Ætatem, (E.)

CONSISTORY COURT.

Vide Courts, (N 6.)

CONSPIRACY.

Vide Action upon the Case for a Conspiracy. — Justices of Peace, (B 107.) — Pleader (2 K).

CONSTABLE.

Constable.

Vide Justices of Peace, (B 79. — D 7.) — Leet, (M 5, &c.)

High Constable.*Vide Officer, (E 2.)***CONSULTATION.***Vide Prohibition, (K 1, &c.)***CONTEMPT.***Vide Attorney, (B 13.)—Chancery, (D 3, &c.)***CONTINGENCY.***Vide Devise, (N 29.)—Estates, (B 16.)—(K 6.)***CONTINUAL CLAIM.***Vide Claim, (A 1, &c.)***CONTINUANCE.**

Continuance of Estate.

Vide Pleader, (C 66, &c.)

Continuance of Parliament.

Vide Parliament, (M).

Continuance of Act of Parliament.

Vide Parliament, (R 2.)

Continuance and Discontinuance of Suit, or Process.

Vide Courts, (P 11.)—Pleader,—(V 1, &c.—W 1, &c.)

Puis darrien Continuance.

*Vide Abatement, (I 24.)***CONTINUANDO.***Vide Pleader, (3 M 10.)***CONTRACT.***Vide Abatement, (E 12.—F 8.)—Admiralty, (E 10, 11.)—Agreement.
—Bargain and Sale.—Baron and Feme (Q).—Dett, (A 8, 9.)
—Enfant, (B 5.)—Idiot, (D 1, &c.)—Merchant, (E 1, &c.)—
Pleader, (2 W 11. 43, &c.)—Trade, (D 3.)—War, (B 2.)***CONTRA FORMAN STATUTI.***Vide Pleader, (2 S 10.)***CONTRA PACEM.***Vide Action upon the Case, (C 4.)—Pleader, (3 M 8.)—Prohibition,
(F 7.)*

CONTRIBUTION.

Vide Chancery (2 I.—2 S).

CONVENT.

Vide Ecclesiastical Persons, (B 4, 5.)

CONVENTICLE.

Vide Justices of Peace, (B 16.)

CONVERSION.

Vide Action upon the Case upon Trover, (E.—G 5.)

CONVEYANCE.

Vide Chancery, (2 T 1, &c.)—(3 M 2, &c.—4 S 2.)—*Discontinuance*, (C 3, 4, 5.)—*Garranty* (D).—*Pleader*, (C 37.)—*Poiar*, (C 5.)

CONVICTION.

Vide Appeal, (G 9. 16.)—*Justices of Peace*, (C 1, &c.)

CONVOCATION.

(A) How assembled.

THE convocation ought to be summoned only by the king's writ. By the *stat. 25 H. 8. 16.* it was enacted, that it shall always be so assembled; and declared by the clergy, that it ought so to be. *4 Inst. 322.*

And it cannot assemble without the king's licence. *R. 12 Co. 72.*

And the convocation is under the power and authority of the king. *Per three J. 21 Ed. 4. 45 b.*

And therefore, at every parliament from the *22d Ed. 3.* there was this clause inserted in the writ directed to every archbishop and bishop, viz. *præmunientes priorem & capitulum (vel decanum & capitulum) archidiaconos, totumque clerum dioceseos vestre, quod iidem prior (vel decanus) & archidiaconi in propriis personis, dictumque capitulum per unum, idemque clerus per duos procuratores, &c. interfint, &c.* *Dudg. Sum. 233. 235, &c. 4 Inst. 4.*

The archbishop of *Canterbury* and archbishop of *York* make their convocations, and grants severally. *21 Ed. 4. 46. b.*

(B) Who ought to assemble.

IN a convocation all the clergy of the province are present, in person, or by representation. *4 Inst. 322. 21 Ed. 4. 55.*

The archbishops and bishops meet in the upper house; the deans, archdeacons, and proctors of the clergy in the lower. *4 Inst. 322.*

CONVOCA T I O N.

(C) Their Privileges.

BY the *st.* 8 *H.* 6. 1. All the clergy, called to convocation by the king's writ, their servants and familiars, shall enjoy the liberty in coming, tarrying, and returning, as the commonalty called to parliament enjoy.

(D) The Jurisdiction.

THE convocation has jurisdiction *in merè spiritualibus*; as, heresy, schism, &c. 4 *Inst.* 322. *Vide Heresy*, (B 1.)

To make fasting-days, holy days, &c. 21 *Ed.* 4. 45.

In causes ecclesiastical, if the king be concerned, there shall be an appeal to the upper house of convocation. 4 *Inst.* 339, 340. *Vide Prerogative*, (D 15.)

But the convocation has no power to bind the temporalty, but only the spirituality. 21 *Ed.* 4. 45.

(E) How they make Canons.

BY the *st.* 25 *H.* 8. 19. The clergy shall not attempt, claim, &c. nor enact, or execute any canons, &c. in their convocation, unless they have the king's licence to make and execute them, on pain of fine and imprisonment. *Vide Canons*.

And, therefore, tho' they be assembled in convocation by the king's licence, they cannot afterwards confer to make canons, &c. without a special licence for such purpose. *R.* 12 *Co.* 72.

So, after canons are made in convocation by the king's licence, they cannot be executed before the royal assent to them. *R.* 12 *Co.* 72.

CONUSANCE.

Vide Fine, (E 9, &c.)—*Pleader*, (3 *K* 14, &c.)—*Statute Staple*.

Conufance of Pleas.

Vide Courts, (P 2, &c.)

· C O P Y.

Vide Evidence, (A 3.)

C O P Y H O L D.

(A) Copyholder.

(A 1.) Who is.

A Copyholder is one, who within a manor, in which there is a custom time whereof, &c. for such tenure, holds lands or tenements to him and his heirs, in tail, or for life, &c. at the will of the lord, according to the custom of the manor. *Co. L.* 58. *Lit. S.* 73.
And

And he is called a *copyholder*, because he holds his land by copy of court roll of the same manor. *Co. L. 58. a.*

Of ancient times they were called *tenants in villenage*, or by *base tenure*, because they held generally by *villein service*. *F. N. B. 12. Co. L. 58. a. 62. 2 Brown 77. [Grant v. Affle, Dougl. 724. 4. 2. contra.]*

But they are called *copyholders*. *1 H. 5. 11.*

Tenants by the verge. *14 H. 4. 34. Lit. S. 78.*

Tenants by roll at the will of the lord. *42 Ed. 3. 25.*

Customary tenants, by the *st. 4 Ed. 1. extent. manarii.*

After tenants. *2 Rol. 236.*

[Formerly copyhold estates were mere tenancies at will, a middle estate between freeholders and villeins; but by length of time, they acquired stability by custom. *Per J. Wilmot, 1 Bur. 1543.*]

(A 2.) What Estate he has.

Tho' a copyholder has an estate at the will of the lord, yet it is according to the custom of the manor. *4 Co. 21.*

And therefore, the lord cannot oust him, if he observes the customs of the manor. *Co. L. 60. b. 62. b. 63. 2 Co. 17. a. R. 4 Co. 21. b. 24. Cro. El. 103. 1 Rol. 510. l. 25.*

And if he be ousted contrary to the custom, he shall not only sue by petition to the lord, but may have trespass against him. *Co. L. 60. b. 62. b. Per Danby, 7 Ed. 4. 19. Per Brian, 21 Ed. 4. 80. Dal. 62.*

So, the lord cannot do any act to determine his interest: and therefore, if the king being lord of a manor grants land by copy, and afterwards grants the fee of the same land by patent; the interest of the copyholder is not destroyed. *R. 2 Co. 17. a. Lane. R. 4 Co. 24. b. Murrel.*

So, if the lord of a manor, in which by custom the wife of a copyholder shall have dower without other admittance, grants the freehold of a copyhold to A. for the life of the copyholder, and afterwards to the copyholder himself in fee; the estate of the wife is not destroyed, because the copyholder continued his copyhold interest for his life. *R. Heb. 181. 1 Rol. 510. l. 40. R. 2 Cro. 126.*

But a copyholder has no estate of freehold; for that remains in the lord. *Lit. S. 81. 2 Inst. 325.*

(B) Copyhold, what.

(B 1.) Ought to be Time out of Mind.

A Copyhold ought to be time whereof, &c. for it cannot begin at this day. *Co. L. 58. b.*

And therefore, if the lord grants land by copy, which has not been so granted before, it is no copyhold. *R. 1 Leo. 56.*

Tho' it continues in grant by copy for forty-seven years. *R. 3 Leo. 107.*

And, if the lord afterwards grants it by copy for a further term of years; he may enter as upon a tenant at will. *R. 3 Leo. 108.*

But a continuance in grant by copy for fifty or sixty years, fixes a customary interest, if it be without interruption. *Semb. 3 Leo. 107.*

Yet where a grant was 10 *H. 8.* and the lord entred 23 *H. 8.* for a forfeiture, and afterwards it continued in grant by copy till 8 *Eliz.* That was an interruption, and it shall be computed in grant by copy only from 23 *H. 8.* which being but forty-seven years will not fix a customary interest. *R. 3 Leo. 107.*

(B 2.) Within a Manor.

It ought to be parcel of a manor, or within a manor. *Co. L. 58. b.*

But it is not necessary, that it continue parcel of the manor; for if the lord grants the inheritance of all the copyholds within his manor, whereby they are severed from the manor, yet the copyholds remain. *R. 4 Co. 26. b. Cro. El. 103.*

And the grantee shall hold customary courts, and take surrenders, and grant by copy, tho' he cannot hold a court-baron. *R. 4 Co. 26. b. But Semb. cont. Cro. El. 103.*

So, if the lord demises the freehold of all the copyholds within his manor, for 2000 years; the copyholds remain, and the lessee shall hold customary courts, &c. *R. 4 Co. 26. b. Neale. Cro. El. 395.*

So, if the lord grants the inheritance of one copyhold, it remains copyhold, and shall pay rents, heriots, and other services to the feoffee, and shall be subject to forfeiture for alienation, waste, &c. as before. *R. 4 Co. 24. b. 25. Murrel. R. 2 Leo. 208.*

Yet the feoffee cannot hold a court, take a surrender, or make an admittance. *R. 4 Co. 25.*

And the copyholder has no way to sell, but by a decree in *Chancery.* *4 Co. 25.*

Or, he may surrender to the use of the same feoffee. *Per Fenner, Cro. El. 252.*

(B 3.) Always demisable.

So, a copyhold ought to be at all times demised, or demisable, by copy. *Co. L. 58. b. [2 Term Rep. 415. 705.] Vide post. (L).*

[And it cannot be created by operation of law; and therefore where wastes are severed from the manor, by a grant of the latter with exception of the former, though the copyholders continue to have a right of common in the wastes by immemorial custom; yet, if afterwards a grant of the soil of those wastes be made to trustees for the use of the copyholders in free socage, the lands when inclosed will be freehold, and not copyhold. *2 Term Rep. 415. 705.*]

But it is sufficient if it be demisable, tho' it was not always demised. *Ibid.*

Tho' leased at will only. *4 Co. 31.*

And therefore, if the lord holds a copyhold, which escheated to him, in his hands for many years, he may afterwards demise it by copy. *Co. L. 58. b. 4 Co. 31. a. R. Cro. El. 699. 1 Rot 498. l. 40.*

So, if it comes into his hands by any other means. *4 Co. 31. a. French.*

And his heir, or assignee, may afterwards re-grant it by copy. *4 Co. 31. a.*

- So, if a copyholder takes a lease, or other estate of the manor or of his copyhold, whereby his copyhold is destroyed, yet the land may afterwards

afterwards be granted by copy; for it was always demisable. *Ag. 4 Co. 31. b. Sav. 70. (Vide 1 Rol. 498. l. 30. Semb. cont.)*

So, if the lord, after a copyhold escheats, &c. demises the manor, and the escheated tenement by express words, yet it may afterwards be granted by copy; for the demise of the manor includes the escheated copyhold as parcel of the demesnes, and the naming of it signifies nothing. *R. Cro. Car. 521. Vide Jon. 449. (Semb. cont.)*

But, if the lord leases such copyhold for life, or years, or conveys it for any other estate (except at will) by deed, or without deed, it cannot afterwards be re-granted by copy; for it was not always demisable. *R. 4 Co. 31. a. Vide post. (L).*

So, if he makes a feoffment, and afterwards enters for a condition broken. *4 Co. 31. a.*

So, if the wife of a lord has been endowed of it. *Ibid.*

Or, it has been extended upon a statute, or recognizance acknowledged by the lord. *Ibid.*

So, if the king, being lord, by letters patents grants an escheated copyhold, &c. not knowing of it, tho' he was deceived. *1 Rol. 498. l. 30. Jon. 449. Cont. 2 Dan. 176. R. cont. 2 Rol. 197. l. 5. Vide post. (L).*

So, if the lord grants land to a copyholder, by bill under his hand, for his life. *1 And. 199.*

Yet, if by a tortious act it has been sometimes not demisable, when such act is avoided, it may be re-granted by copy; as, if a copyholder be ousted and the lord disseised, and there be a descent after the disseisin, yet after re-continuance, it may be granted by copy. *4 Co. 31. a.*

So, if a copyhold has been recovered by a false verdict, or an erroneous judgment. *Ibid.*

So, if a husband, seised of a manor in right of his wife grants by indenture an escheated copyhold, &c. the wife after his death may re-grant it by copy. *Per two J. Cro. El. 459. 2 Rol. 271. l. 25.*

So, if tenant for life leases by indenture, the reversion may be re-granted. *Per two J. Cro. El. 459. 2 Rol. 271. l. 20.*

Or, if tenant in tail leases. *2 Rol. 271. l. 24.*

Or, lessee for years of a copyhold. *2 Rol. 271. l. 15.*

(C 1.) What Tenements are grantable by Copy.

A Manor may be granted by copy. *Co. L. 58. b. R. 11 Co. 17. b. Nevil. 2 Cro. 327. 260. Yel. 191.*

So, all lands and tenements within the manor. *Co. L. 58. b.*

So, the herbage and *vestura terre*. *Co. L. 58. b. R. 4 Co. 30. b. Hoe.*

Tonsura terre. *Per Gawdy, 1 Rol. 498. l. 15.*

So, tithes; for they may be parcel of a manor, as well as a rent-charge. *Dub. Cro. El. 814. R. Cro. El. 413. Per Rol. 1 Rol. 498, l. 10. Mo. 355.*

So, underwood without the soil. *R. 4 Co. 30. Hoe. Co. L. 58 b. Cro. El. 413. Mo. 355.*

And the lord cannot take underwood there in common. *R. Cro. El. 413. Mo. 355.*

So, a mill. *R. 4 Leo. 241.*

So, every thing, that concerns lands and tenements: as, a fair appendant to a manor. *Co. L. 58. b. Mo. 355.*

And a market. *Cro. El. 413. Mo. 355.*

And a fishery. *Mo. 355.*

And common. *D. Cro. El. 814.*

But where a manor is granted by copy, it cannot have freeholders, or a court-baron, but a customary court for the admission of copyholders. *R. 2 Cro. 260. Adm. 2 Cro. 327.*

Nor shall have forfeiture of the tenements. *2 Cro. 260.*

Nor hold plea in writ of right. *Ibid.*

(C 2.) How granted.

If the lord grants a copyhold upon a surrender, he ought to grant it according to the intent of the surrender.

And he cannot increase the rent, or services, or add a condition. *2 Rol. 236.*

But where a copyhold comes to the lord by escheat, forfeiture, &c. he may grant it *de novo* by copy, rendring a greater rent. *2 Rol. 236.*

(C 3.) What Lord may grant.

(C 3.) *Dominus pro tempore*] Every one having a lawful interest in a manor, may make voluntary grants of copyholds escheated, or come to his hands, as well as admittances, rendring the ancient rents and services, which bind him who has the inheritance. *4 Co. 23. b. Co. L. 58. b. Mo. 112.*

As, tenant in fee or tail. *4 Co. 23. b.*

Tenant for life. *R. 4 Co. 23. b.*

Tenant by curtesy. *4 Co. 23. b.*

Tenant in dower. *Ibid.*

Tenant by statute-merchant, staple, or *elegit*. *4 Co. 23. b. Co. L. 58. b.*

Tenant for years. *4 Co. 23. b. Co. L. 58. b. R. Mod. Ca. 63.*

Guardian in *chivalry*, or socage. *4 Co. 23. b. Co. L. 58. b. R. Ow. 115. 2 Cro. 55. 98. 1 Rol. 499. l. 23. Godb. 143.*

Tenant at will of a manor; for the copyholder is in by the custom, without regard to the person, or estate, of the lord. *4 Co. 23. b. Co. L. 58. b. Agr. 6 Co. 60. b.*

Feoffee upon condition may make voluntary grants, which stand after the condition broken. *R. 4 Co. 24. a.*

So, grants by a bishop bind his successor, and the king when the temporalities are in his hands. *4 Co. 21. 23. b.*

So, grants by a prebendary, parson, &c. bind for ever. *4 Co. 23. b.*

So, if the lord takes a wife, who is entitled to dower by the marriage, and afterwards makes a voluntary grant; this binds the wife after the death of her husband. *R. 4 Co. 24. a. R. 8 Co. 63. b. Cont Mo. 94. R. acc. Mo. 812.*

So, if an infant makes voluntary grants, they bind for ever. *4 Co. 23. b.*

Or an idiot, or *non compos*. *Ibid.*

So, a lunatic by his steward. *2 Dan. 178.*

So, when a reversion is demisable by copy, tenant in dower may grant it by copy, as well as the possession; and the grant binds the heir. *R. 1 Rol. 499. l. 20. Cro. El. 662.*

So,

So, every other particular tenant of a manor. *R. Mo. 147. Cro. El. 662. Godb. 143.*

And the grant is good, tho' the reversion does not fall in possession during the estate of the lord who made the grant. *Cont. per all the Judges accept two. Mo. 95. Acc. per two J. Cro. El. 662. R. 2 Rol. 41. l. 12. 2 Co. 99. R. 1 Rol. 449. l. 20.*

And if a copyholder by custom has estovers, common, &c. appurtenant to his copyhold, and the lessee for years, &c. excepting wood, waste, &c. whereby they are severed from the manor, makes a voluntary grant, the grantee shall have common, estovers, &c. as before; for he is not in by the lord, but *paramount*. *R. 8 Co. 63. Mo. 812.*

But tenant at will of a manor cannot grant a copyholder licence to alien for years. *R. 8 Jac. 1 Rol. 511. l. 10.*

And if tenant for life of a manor grants a licence to alien for years, it determines at his death. *R. 1 Rol. 511. l. 15.*

So, if an husband is seised in right of his wife, the wife ought to join in the grant. *2 Cro. 99.*

So, if a copyhold comes to the lord by forfeiture, escheat, &c. and he binds himself in a statute, and afterwards re-grants the copyhold, it shall be liable to the statute. *R. Mo. 94. 1 Leo. 4.*

So, if the lord grants a rent-charge, and afterwards re-grants a copyhold, it shall be liable to the rent. *R. 2 Leo. 152. 3 Leo. 59.*

So, if the lord grants a rent-charge, and afterwards a copyhold escheats, &c. and the lord re-grants it, it shall be liable to the rent. *R. Dy. 270. b. R. cont. 2 Brownl. 208.*

But if a copyholder surrenders to the lord, to the use of *A.* and the lord admits him; *A.* shall not be liable to the statute or charge of the lord. *R. 1 Leo. 4. Dy. 270. b.*

(C 4.) *By wrong, &c.*] So tenant of a manor by wrong, or defeasible title, may make an admittance upon a surrender, which will bind him who has the right; for this is a lawful act, to which he is compellable in equity; as, a disseisor, abator, or intruder. *4 Co. 24. a. Co. L. 58. b.*

Tenant of a disseisor. *4 Co. 24. a.*

Tenant by sufferance. *R. 4 Co. 24. 2 Leo. 46, 7.*

Devisee, tho' afterwards the devisor be found *non compos*. *Per Popham, Ow. 28. R. 2 Leo. 46, 7.*

Tho' a surrender be to the disseisor *ut dominus faciat voluntatem suam*, whereupon he grants it to *A.* in tail according to the intent of the surrender. *2. 1 Rol. 503. l. 25.*

But a lord by defeasible title cannot make voluntary grants to bind him who has the right. *Co. L. 58. b. 4 Co. 23. b. Ow. 28. R. 4 Co. 24. a. Rous. Mo. 236.*

So, he cannot admit to a greater estate upon a surrender than the surrenderer can give: and therefore, if tenant for life, or in tail, surrenders to a disseisor to the use of *A.* for life, or in tail, and the disseisor admits accordingly, this does not bind the disseisee. *1 Rol. 503. l. 27.*

So, he cannot accept a surrender to the use of himself, but such surrender will be void; as, an executor *de son tort* cannot retain for his own debt. *R. 2 Jon. 153. 1 Vent. 359. 2 Mod. 287.*

And if a lord, who has a defeasible title, makes a voluntary grant,
entry

entry or recovery of the manor by the disseisee avoids it. *R. Poph. 71.*

So, if a devisee for payment of debts makes a grant, and the wife is endowed of the third part of the manor, and this copyhold is assigned for her third, she shall avoid the grant. *R. Dy. 251. a.*

(C 5.) What Steward may grant.

A grant by any steward, who has colour of title, is good; and therefore, if two are joint stewards of a manor by patent, and one of them holds a court and makes grants, it is sufficient. *R. Mo. 112.*

So, if the clerk of a steward holds a court, and makes grants; for the tenants cannot examine his authority, neither need he give them an account of it. *Ibid.*

So, if there be a steward *ad exequend' per se aut deput'* and he makes a deputy *pro hac vice.* *R. Cro. El. 48.*

So, if a deputy of a steward deposes another, who holds courts and makes grants; tho' he has no title, for a deputy cannot make a deputy. *R. in B. R. 12 W. 3. inter Parker and Keck. R. 1 Leo. 288. Vide Salk. 95. (Comyns's Rep. 84.)*

So, if a deputy, to take a surrender to *A.* in fee, takes surrenders, which are not pursuant to his authority; yet it is sufficient. *R. 1 Leo. 289.*

So, if a deputation be to take a surrender to *A.* in fee, and he takes a conditional surrender: it is sufficient. *R. 1 Leo. 289. Adm. Cro. El. 48.*

But a grant by a steward, contrary to the command of the lord, is void. *Per Poph. Cro. El. 699.*

Or, by less services. *Cro. El. 699.*

Yet a grant by the king's steward of a copyhold escheated, without warrant, is good, tho' not agreeable to his duty. *R. 4 Co. 30. a.*

(C 6.) By what Words.

A grant to *A. habendum* to him and his wife, is void to the wife, she being named only after the *habendum.* *R. 1 Rol. 67. l. 45. Vide post. (F 6.)*

So, a grant to *A. habendum* to him, his wife, and son, is void to the wife, and son. *R. 2 Rol. 68. l. 10.*

So, a grant to *A.* and his son, who has several sons, is void for uncertainty. *R. 2 Cro. 374.*

Otherwise, if it be averred that *A.* had but one son. *R. 2 Cro. 374.*

(C 7.) What Estate.

(C 7.) *In fee.*] The lord may grant a copyhold to hold to a man and his heirs in fee-simple. *Lit. S. 73.*

So, a copyhold may be granted to *A.* and his heirs, upon condition, that he pay 100*l.* to *B.* and if he does not pay, to *B.* and his heirs. *Per Beaumont, Cro. El. 361. Semb. 1 Rol. 137. 254.*

So, it may be granted to several and their heirs, by which they are joint-tenants.

And if it be granted to four and their heirs equally to be divided, they are joint-tenants, and not tenants in common. *Per Holt, but two J. cont. in B. R. inter Fisher and Wigg, T. 12 W. 3. Vide Sal. 391. (Comyns's Rep. 88.)*

(C 8.)

(C 8.) *In tail.*] So, by custom, co-operating with the *stat. W. 2. 1. de donis*, a copyhold may be granted in tail. *Lit. S. 73. Co. L. 60. a. b. Adm. 1 Sid. 314. R. 3 Co. 8. Mo. 128. Per two J. Poph. 34, 35. R. Poph. 128. Semb. 1 Rol. 48. R. Cart. 22. D. 2 Brow. 77. 44. R. 1 Rol. 838. l. 20.*

And if a custom allows a grant to man and his heirs, it warrants also a grant to him and the heirs of his body. *R. 4. 23. Gravenor. Co. L. 52. b. Poph. 35. Semb. per Holt, M. 2 Ann. Vide 6 Mod. 63. 66.*

But it is no evidence of a custom to make a grant in tail, that land has used to be granted to a man and the heirs of his body, unless there has been also a remainder after such estate. *Co. L. 60. b.*

Or, the issue has avoided the alienation of his ancestor. *Ibid.*

Or, has recovered in *formedon in descender. &c. Ibid.*

And it seems, that the *st. de donis*, without a custom does not make an entail; for it does not extend to copyholds. *Co. L. 60. a. R. 3 Co. 8. Vide post. (N). R. Cro. El. 717. Godb. 369.*

[A copyhold to husband for life, wife for life, heirs of the bodies of husband and wife, remainder in fee to the survivor, is an estate-tail after possibility of issue extinct in the wife who survives, and the estate vests in the person who is heir of the body of both husband and wife. *Sutton v. Stone, M. 1740, 2 Atkyns, 101.*]

(C 9.) *Estate-tail how barred.*] But if by custom a copyhold may be entailed, it may also be barred. *Co. L. 60. b. Ag. 1 Rol. 49.*

And therefore, a common recovery may be in the lord's court to bar such entail. *Dub. 4 Co. 23. a. Cro. El. 372. 391. R. 1 Rol. 506. l. 10. Agr. Mo. 753. 358.*

Tho' there be not any special custom to warrant such recovery. *R. 1 Rol. 506. l. 20. D. Mo. 358. Per Holt obiter in the case of Hunt and Bourn. (Vide Sal. 340.)*

So, by custom, it is a good bar to an entail, that a copyholder commits a forfeiture by alienating without licence, and the forfeiture is presented in court, and thereupon the lord seizes it, and afterwards makes a grant to A. and his heirs, for whose benefit the forfeiture was intended. *R. 2 Sand. 422. 1 Sid. 314. Dub. Sti. 450.*

Or, that a copyholder surrenders to A. and his heirs, who shall commit a forfeiture, &c. *R. 1 Sid. 314.*

In such case the lord cannot admit any other, than the person for whose benefit the forfeiture was intended. *R. 2 Sand. 422.*

And, if the lord does otherwise, a purchaser shall avoid all mesne acts when he is admitted, as well as upon a surrender. *2 Sand. 422.*

So, a copyhold in tail shall be barred, by acceptance of a feoffment from the lord and afterwards a fine levied at common law. *R. Cart. 23. Vide post. (N).*

Tho' there be a custom, that it shall be barred by forfeiture, & non aliter; for such custom (as to the non aliter) is void. *R. Cart. 23.*

But an entail cannot be barred by surrender only; for a custom to bar by surrender alone, is void. *Per Coke, Lo. 188. Cont. if the custom allows it. Semb. Poph. 129. 2 Brow. 121.*

[There may be a good custom in a manor, that tenant in tail may surrender, and bar his issue, without suffering recovery; or that he may suffer recovery in the manor-court, and have the same effect. *Everall v. Smalley, M. 17 G. 2. Str. 1197. Wilf. 26.*] [lu

[In a manor where copyhold may be entailed either by special custom, or by the general doctrine of surrender in fee, *vel aliter*, &c. if a custom does not appear to bar by recovery in that manor, it may be barred by surrender: for otherwise it would create a perpetuity. *Moore v. Moore*, T. 1755. 2 *Vezey*, 596.]

[And this surrender to the use of the will only. *Ibid. Car. v. Singer*, P. 1750, in C. B. 2 *Vezey*, 603.]

[By custom, it may be barred by surrender, and wherever tenant in tail of a freehold can bar the estate by any means, there tenant in tail of *such* copyhold may bar by surrender. *Martin v. Mowlin*, P. 33 G. 2. 2 B. M. 969. 980. *Vide Ambler*, 279.]

[In *such* manor, if A. devises to his son B. and C. his wife, and the heirs of the body of B. on C. begotten; this estate may be barred by surrender of B. alone. *Ibid.*]

If a common recovery is erroneous, it cannot be reversed but by a petition to the lord, in nature of a writ of error. *Adm. Ca. Parl.* 67.

And if the lord refuse to receive such petition, he shall not be compelled to it in equity. *R. in Ch. upon Dem. to a bill, and affirmed in Parliament. Ca. Parl.* 67. *R. 1 Ver.* 368.

Recovery in value shall be only of other copyhold in the same manor. *Mo.* 359.

(C 10.) *For life, &c.*] So, custom allows a grant of copyhold for life. *Lit. S.* 73.

And when, by custom, a grant may be to a man and his heirs, the same custom warrants a grant of any less estate, as for life, &c. tho' there never was such a grant before. *R. Co. L.* 52. b. 4 *Co.* 23. *Gravenor. R. 1 Leo.* 56.

Tho' the custom says, that there shall be a grant in fee *solummodo*; for that cannot restrain what is incident by law. *R. 1 Rol.* 511. l. 30.

So, by a custom allowing a grant for three lives; it may be granted to three for the lives of two. *R. 1 Rol.* 511. l. 40.

Or, for two lives, or one life. *Per Popb.* 35.

Or, to one for the life of himself, and two others *successivè*. *R. 1 Sal.* 188.

But a grant to A. for his life, remainder for the life of his wife, and the first son which he may afterwards have, is warranted only for his own life. *M. Mo.* 677.

So, by a custom allowing a grant for life, it may be granted *durante viduitate*. *R. 4 Co.* 30. *Down. Cro. El.* 323.

So, by a custom which allows a grant to three *successivè sicut nominantur*, a grant may be to A. for three lives. *R. Mod. Ca.* 67. 1 *Sal.* 188.

If the grant be for the lives of him and his two brothers, his son shall have it.

And if he dies without issue, his executor, or administrator, and not the other lives. 1 *Ver.* 415.

If a grant be for three lives *successivè sicut nominantur*, by custom the wife of the grantee may have *free bench*, whereby the estate is continued during the life of the wife. 1 *Lev.* 21.

If the lord makes a lease for forty years, from the death, surrender, or other determination of the estate, and the three lives all die; the lease

lease does not commence till the death of the wife: for it shall be such a death as determines the estate. *Per two J. 1 Leo. 21.*

So, a custom allowing a grant for life, &c. warrants a grant for years. *4 Co. 23. Co. l. 52. b.*

(C 11.) *In remainder.*] So, by custom, a copyhold may be granted in remainder. *Adm. 1 Sand. 151. R. 4 Leo. 9.*

And if a custom allows a grant in fee, it warrants a grant in tail, for life, or years, remainder to another and his heirs. *Co. L. 52. b. Poph. 35.*

So, a surrender may be to *A.* in fee, and if he dies within age, and unmarried, to *B.* in fee; the remainder to *B.* is good. *Semb. 2 Rol. 791. l. 40.*

So, he in remainder may be admitted to it by himself. *Lut. 758.*

But a grant in remainder may be restrained to the assent of the tenants. *Dub. 3 Leo. 226.*

(C 12.) *Reversion.*] So, a reversion of a copyhold estate may be granted, but not without a special custom. *D. Mar. 6. Vide post.*

(F 6.) *R. 3 Leo. 239.*

So, a man admitted to a reversion may surrender to another.

Or, a moiety or two parts, &c. *Ray. 18.*

So, if a lease be of a copyhold by licence rendring rent, the copyholder may surrender by name of a reversion. *Vide post. (F 6.)*

And there needs no attornment; for the admittance is tantamount to an inrolment, and supplies it. *Per two J. 1 Leo. 297. R. Hob. 177. R. Ray. 18.*

(D 1.) Descent of a Copyhold.

TH^O a copyholder holds at the will of the lord, yet, by custom, his estate is descendible to his heir. *R. 3 Co. 21. Brown.*

And the descent shall be regulated by the rules of the common law, as incident to an estate descendible. *R. 4 Co. 22. a.*

[A copyholder, heir to her mother, before admission devises to *A.* and dies without admission or surrender, the lands shall descend to her heir on the part of her mother. *Smith v. Trigg, M. 8 G. Str. 487.*]

And therefore, if a copyholder, having a son and a daughter by one venter, and a son by another venter, makes a lease for years and dies, and afterwards the eldest son dies before admittance; the daughter shall have it, not the son. *R. 4 Co. 21. Brown. Dy. 291. b.*

If there be a copyholder for years, remainder to *A.* and his heirs; *A.* dies during the years; his sister of the whole blood shall take, for the possession of the termor was his possession. *R. 1 Vent. 261. 1 Mod. 120.*

So, if a copyholder dies, and the guardian of the heir be admitted; his possession is sufficient to cause the sister of the whole blood to inherit. *Dy. 292. a. 1 Rol. 502. l. 50. Dal. 110.*

So, if the heir dies before admittance, or guardian assigned; if the homage find him to be heir, it is sufficient to cause his sister to inherit. *R. Mo. 125.*

Otherwise, if, by custom, the lord may demise to a stranger during the minority of the heir; the possession of the stranger does not cause the sister to inherit. *D. Dal. 110.* So,

So, if the heir of a copyholder dies before admittance, the descent shall be to the heir of the whole blood. *R. Dy. 291. b. Mo. 125.*

So, if a copyholder dies, his wife *privement enseint* with a son, and his daughter, as heir, is admitted, and afterwards the son is born; he shall have it, and enter upon the daughter.

So, if a copyhold be limited in remainder, it ought to vest during, or at the end of the particular estate. *1 Rol. 238. 438.*

And if the remainder be contingent, it shall be in abeyance till the contingency happens. *R. 417. l. 45.*

But a surrender by a copyholder for life, before the contingency, does not defeat it. *Semb. 2 Rol. 794. l. 45. Vide post. (F 14.)*

But, by special custom, a descent may be contrary to the rules of the common law. *Vide post. (K 4.)*

[But the custom shall be interpreted strictly; thus where there is a custom within a manor that lands shall descend to the *eldest sister*, where there is neither a son nor a daughter, this shall not extend to an *eldest niece*; but in default of such son, daughter and sister, the lands must descend according to the rules of the common law. *1 Term Rep. 466.*]

(D 2.) What an Heir may do before Admittance.

And the heir, upon a descent, may enter and take the profits, before admittance. *R. 4 Co. 22. b. Brown. 4 Co. 23. b. Clerk. Dy. 291. b.*

And shall have trespass. *4 Co. 23. b. Clerk. R. Noy, 172.*

And may make leases. *R. Mo. 596.*

And the lessee may maintain an ejectment, before the admittance of his lessor. *R. 1 Leo. 100.*

So, he may surrender to the use of another, before admittance; but the lord shall not lose his fine. *R. 4 Co. 22. b.*

So, he may surrender a reversion descended to him, before admittance. *R. 1 Rol. 499. l. 25. Cro. El. 662. R. 2 Cro. 36.*

So, if the heir dies before admittance, his heir shall enter and take the profits, and shall have trespass, before his admission. *R. 4 Co. 23. b. Clerk.*

If a surrender be to *A.* for life, remainder to his eldest son in fee, and *A.* dies; his heir shall enter before admittance, tho' he claims by purchase. *Per Hale, 1 Mod. 120.*

So, the lord may avow for his rent, before admittance. *Kit. 87. b.*

But he shall not be sworn upon the homage, before admittance. *Ibid.*

(E) What Collateral Qualities a Copyhold shall have.

BUT a copyhold shall not have the collateral qualities of other inheritances, which do not concern the descent, without special custom: as, a husband shall not be tenant by the curtesy of a copyhold, without special custom. *R. 4 Co. 22. a. Brown. R. 4 Co. 22. b. Rivet. R. Cro. El. 361. 1 And. 192.*

But, by special custom, he shall be tenant by the curtesy. *Vide post. (K 1.)*

A wife shall not be endowed. *4 Co. 21. Brown. R. 4 Co. 30. b. Shaw. Mo. 410. Cro. El. 426.*

But, by special custom, she shall. *Vide post. (K 2.)*

So,

So, a descent of a copyhold does not toll entry. 4 Co. 22. *Brown*.
R. 4 Co. 23. *Gravenor*. R. 2 Cro. 36. *Poph*. 35.

So, if upon a descent the lord admits a stranger, before the heir,
it is no disseisin. R. 3 *Leo*. 210.

So, there shall be no occupant of a copyhold, but it goes to the
lord. *Noy*, 47. *Vide post*. (F 14.)

So, a copyhold shall not be affets in the hands of the heir to charge
him upon a bond of his ancestor. 4 Co. 22.

So, a surrender of a copyhold with warranty, the warranty is void.
Mo. 352.

So, a surrender by a copyholder seised in tail, does not make a dis-
continuance; for there is no livery, nor warranty. 4 Co. 23. *Cont*.
R. Cro. El. 383. 717. *Cont. per Walmsly*, 2 Cro. 105. *Acc. Mo*. 358.
R. *acc. Mo*. 753. R. *acc. Cro. El*. 148.

So, a surrender by a husband, seised in right of his wife, does not
make a discontinuance. R. 4 Co. 23. *Bullock*. R. *Mo*. 596.

A surrender by an infant does not put his heir to a *dum fuit infra*
etatem. R. 1 *Leo*. 95.

So, a surrender in fee by a copyholder for life is no forfeiture. *Vide*
post. (M 2.)

So, a surrender by a copyholder for life, and him in remainder in
fee, being an infant, does not bar, nor put the heir of the infant to a
dum fuit infra etatem. *Per two J. Cro. El*. 90.

So, the lord cannot grant the custody of customary lands to a com-
mittee, if his copyholder is a lunatic, without special custom. *Per*
Hob. 215. *Hut*. 16. *Vide post*. (K 5.)

Nor the guardianship of his copyholder, if he be an infant. R. *Lut*.
1190. *Vide post*. (K 5.)

But if a copyholder dies, his heir within the age of fourteen years,
his *prochein amy* shall be a guardian to him, if there is no special
custom in the manor for it. R. 2 *Rol*. 40. P.

So, if tenant for life, remainder to the first and other sons in tail,
remainder to B. in fee, purchases the fee, and B. surrenders; the
contingent remainder to the first and other sons is not destroyed, for
the freehold in the lord supports it. R. 2 *Ver*. 243.

So, a copyholder cannot take housebote, hedgebote, cartbote, &c.
as a freeholder for life or years, without special custom. R. *Cro. El*. 5.
Cont. Cro. El. 361. 1 *Brow*. 132. *Vide post*. (K 7.)

(F) Surrender of a Copyhold.

(F 1.) In Court.

IF a copyholder will alien his land to another, he ought according
to custom to make a surrender to his use. *Lit. S*. 74.

And every copyholder may surrender in court, without alleging in
pleading any special custom for it. Co. L. 59. a. 9 Co. 75. b.

(F 2.) Out of Court.

(F 2.) *To the lord.*] So, a copyholder may surrender to the lord him-
self, out of court, without alleging a special custom for it. Co. L. 59. a.

So, out of the manor. *Adm. 1 Sal*. 184.

(F 3.)

(F 3.) *To the steward.*] So, he may surrender, out of court, to the steward. *R. 4 Co. 30. b. 1 Sal. 184. (Vide 2 Cro. 526.)*

Tho' it be to the use of the steward. *R. Cro. El. 717.*

Tho' the steward be retained only by *parol.* *R. 4 Co. 30. b. 1 Leo. 228. R. 2 Cro. 526.*

So, a steward, out of court, may examine a *feme covert*, without a special custom for it. *R. 2 Cro. 526.*

And may depute another to take the surrender. *1 Sal. 95.*

And a surrender to such a deputy in *Ireland*, &c. is good.

So, a surrender may be to the steward, out of the manor. *Semb. 1 Sal. 184.*

So, a surrender to *A.* deputed by a deputy of the steward, is good. *R. 1 Sal. 95.*

But a surrender cannot be to a steward, out of the manor, if he be by *parol.* *R. Godb. 142.*

(F 4.) *To tenants, &c.*] So, by special custom, he may surrender to two tenants of the manor. *Co. L. 59. a. Lit. S. 79.*

But he ought in pleading to allege a special custom for it. *Co. L. 59. a.*

Or, to the reeve or bailiff, &c. *Co. L. 59. a. Lit. S. 79.*

Or, to the bailiff in the presence of two tenants, *hoc testifican?* *Kit. 102. b.*

Or, to one tenant. *Ibid.*

Or, to one tenant in the presence of others. *Ibid.*

And if a copyholder covenants to make a surrender; if he surrenders to two tenants, it is sufficient. *R. 1 Lev. 293. 1 Mod. 61.*

The heir may surrender a reversion to two tenants, before admittance. *1 Rol. 499. l. 45.*

So, if he alleges a surrender to two tenants *secundum consuetudinem*; it is sufficient upon covenant to surrender, without alleging a custom for it. *R. 1 Mod. 61.*

But husband and wife cannot surrender to two tenants; for they cannot take an examination of the wife, without special custom. *R. Cro. El. 717.*

And a custom, that tenants who take a surrender, if they do not present it at the next court, forfeit their copyholds, is good. *Adm. per Holt, 3 Ann. int' Stint and Blount.*

But an action upon the case does not lie against tenants, for refusing to take a surrender. *1 Rol. 108. l. 40.*

(F 5.) By Attorney.

A copyholder may surrender in court by attorney, without a special custom to warrant it; for he may surrender by the general custom of *England*, which is the common law, and then it is incident to do it by attorney. *R. 9 Co. 75. b. 1 Rol. 500. l. 50. Per Wray, two J. cont. 1 Leo. 36.*

[But a custom, that a surrender must be made in person, unless in special case of disability, is not contrary to law. *Mitchel v. Neal, M. 1755, 2 Vezey, 679.*]

[A purchaser of a copyhold is not obliged to accept of a surrender by attorney, but may insist on the vendor's surrendering in person in court. *Ibid.*

But he cannot surrender into the hands of two tenants, by attorney ; for such surrender, tho' in person, is not warranted, without special custom. *R. 9 Co. 76. a. b. 1 Rol. 501. l. 5.*

And if he covenants to surrender on request, the refusing to execute a letter of attorney to make a surrender is no breach. *R. Cro. Car. 299.*

An attorney who makes a surrender, ought to make it in the usual form ; as, by the rod, &c. according to the custom of the manor. *R. 9 Co. 76. b. 1 Rol. 501. l. 10.*

And he ought to make it in the name of the copyholder, not in his own name. *9 Co. 76. b.*

Or shew his authority, and say, that he surrenders by force of such authority. *R. 9 Co. 77. a. 1 Rol. 501. l. 15.*

But a deputy may act in his own name, as well as the name of his principal. *R. 1 Sal. 96.*

And therefore, a surrender to him who is deputed by the steward, without taking notice of his authority, is good. *Ibid.*

(F 6.) By what Words.

A surrender in general words (*in manus domini*) is sufficient without limiting any estate ; for the lord is but an instrument, for the admission of the *cestuy que use*. *Co. L. 59. b. 4 Co. 29. Bunting. Vide ante, (C 6.)*

So, he who has a fee, may surrender to another in fee, or for a less estate, as in tail, or for life, without special custom. *Per two J. Godb. 20.*

So, if a man has made a surrender to *A.* for life, he may afterwards surrender the reversion, or remainder of the copyhold, if he be not restrained by the custom. *R. 4 Leo. 9. Adm. 1 Sand. 151. Vide ante, (C 11, 12.)*

And if he has made a lease by licence, he may afterwards surrender his copyhold by name of the reversion. *R. 2 Rol. 45. l. 5. Semb. 3 Bul. 81. R. Hob. 177.*

But it ought to be an actual surrender ; for if a man comes into court, and renounces his copyhold, it does not amount to a surrender. *R. 1 Rol. 502. l. 5.*

Or, if he takes a new copy for his life ; this is not a surrender of his first estate (at least but for his life) ; for a copyhold shall not be extinct by a surrender in law. *R. 1 Rol. 501. l. 50. 3 Bul. 81. and there Semb. that was a surrender to the use of himself for life.*

So, if a copyholder joins with the lord in a fine *sur consance de droit* to *A.* it does not amount to a surrender, for the customary interest does not pass by the fine ; and therefore a second life, where, by the custom, a surrender of the first life bars him, is not barred by the fine. *R. Ray. 503. 2 Jon. 153. Pol. 564.*

But if the lord pretends a forfeiture, and the copyholder agrees afterwards with the lord to accept a grant of part for his life, that amounts to a surrender. *R. 1 Leo. 191.*

So, if a copyholder in court prays the lord to accept. *Per H. b. Hut. 65.*

So, a surrender to the use of *A.*, *habendum* to him and his wife, is void to the wife, she being named only after the *habendum*. *Semb. 2 Rol. 67. l. 52.*

Yet, if the surrender was general, without mention of any use, and the surrenderor takes a new copy which says, *quod ipse cepit extra manus domini cui dominus concessit habendum* to him and his wife; it is good to the wife, for it was granted to nobody before the *habendum*, and upon such a general surrender and acceptance of a new grant, the surrender shall be intended to both. *R. 2 Rol. 67. l. 25. 2 Cro. 434. Popb. 125.*

So, a surrender to commence after the death of the surrenderor, is void. *R. 4 Leo. 8. 2 Rol. 61. C. 2 Cro. 376. R. Godb. 451.*

So, a surrender to an infant in fee, and if he dies before twenty-one, to *B.* If the contingency does not happen in the life of the surrenderor, tho' it happens afterwards, the estate to *B.* is void. *R. 2 Rol. 794. l. 50.*

Yet, a surrender in writing to *A.*, and at the end a *memorandum*, that the surrender shall not be of effect till the death of the surrenderor; the *memorandum* is void, and the surrender being complete before shall be good. *R. 2 Rol. 61. C.*

So, a surrender to *A.* if an infant *in ventre sa mere*, dies within age, is void. *R. 2 Cro. 376. 2 Bul. 272.* For a surrender cannot take effect upon a contingency. *1 Rol. 109. 137. 253. Godb. 264.*

So, a surrender to an infant *in ventre sa mere* is void; because it commences at a future day. *Semb. 1 Rol. 253.*

But a surrender to *A.* for life, and afterwards to an infant *in ventre sa mere*, is good, if the infant is born in the life of *A.* *Semb. 1 Rol. 254. 2 Rol. 415. l. 55.*

So, a surrender to commence at a future day is void. *Semb. 1 Rol. 137. 253. Godb. 265.*

So, a surrender does not pass the fee without the word, *heirs*: as, if a surrender be to *A.* and his son, and for want of issue of the body of the son, remainder to *B.* The son has it only for life. *1 Rol. 839. l. 50.*

[Because a surrender is considered as a common law conveyance, and is not entitled to the same favourable construction as a will. *Per Lord Kenyon C. J. Wright v. Kemp, B. R. M. 30 Geo. 3. 3 T. R. 473.*]

[In order to effectuate the intention of the parties the court will construe the word "or" to mean "and," as well in a surrender of copyhold premises, as in a will. *Ibid.*]

(F 7.) By what Persons.

So, a surrender by him who has no ability; as, by an infant, is void; and he may enter at full age, tho' the grantee was admitted. *R. Mo. 597. R. 1 Leo. 95.*

So, a surrender by the husband of a copyhold of him and his wife, is void as against the wife. *Adm. 4 Leo. 88. Vide ante (E).*

So, a surrender by a surrenderer, before admittance, is void. *Vide post. (G 1.)*

So, if a devise be to *A.* upon condition, that he pay 100 *l.* to *B.*, and if not, then to *B.*: *A.* does not pay; *B.* cannot surrender, before admittance and actual entry. *Per Holt, at the Assizes, 13 W. 3. int' Clerk and How. (Vide 1 Ld Ray. 726.)*

So, a surrender by a disseisor is void; as, if he in reversion enters upon tenant for life. *R. 2 Mod. 32.*

So,

[So, if the heir apparent of a copyholder in fee, surrender in the lifetime of his ancestor, and survive him, the heir of such surrenderor is not estopped by that surrender of his ancestor, from claiming against the surrenderee. *Goollittle v. Morfe*, B. R. T. 29 Geo. 3. 3 T. R. 365.]

But a surrender by husband and wife, (the wife being examined by the steward according to the custom,) binds the wife. *Adm. Lit.* 274. *Vide Baron and Feme*, (G 4.)

[Whether *feme-covert* can surrender without her husband's joining, though in his presence. *Dub. Taylor v. Philips*, P. 1749, 1 *Vezey*, 229.]

[But by custom such a surrender would be good. *Moor*, 123.]

[Yet a custom that a *feme-covert* may surrender her copyhold without the assent of her husband, is void. 2 *Wils.* 1, 2.]

[But without any special custom, a *feme-covert*, separated from her husband under covenants that she shall enjoy to her own use, and dispose as she thinks proper, of what property shall descend to her, may surrender copyhold lands descended to her after the separation, without her husband. *Compton v. Collinson*, C. P. H. 30 Geo. 3. 1 *H. Bl.* 334. 2 *Brown*. 377. S. C.]

And if a husband grants a copyhold of his wife to the lord, who grants it to a stranger, and the wife after the death of her husband recovers, and grants it to the lord; he shall not have it against his own grant to the stranger. *Per Wray*, 4 *Leo.* 88.

(F 8.) To what Use.

The surrenderor ought to declare, upon a limitation of the uses, what estate the surrenderee shall have; for if he surrenders to the use of *A.* generally, *A.* takes but for life. *Co. L.* 59. b. *R.* 4 *Co.* 29. *Bunting*.

[If the uses are indorsed on the back of the surrender, and signed by the steward, it is sufficient, though they are not specified in the rolls. *Car v. Ellisen*, P. 1744, 3 *Atkyns*, 73.]

If he surrenders without limiting any use at all, the lord shall have it. *Kit.* 81. b. But the lord shall have it to the use of the surrenderor. *Semb.* 1 *Rol.* 253.

Yet if a surrender be without any use expressed, and at the next court the surrenderor and his wife are admitted, it shall be intended that the surrender was to their use. *R. Poph.* 125. *Vide ante*, (F 6.)

So, by custom, it may be, that upon a surrender to another without limiting any estate, the lord shall admit him in fee. *R.* 1 *Rol.* 48.

Or, upon surrender to another for money, without limiting any estate. *R.* 1 *Rol.* 48.

By special custom, a surrender *sibi & suis* may create an estate of inheritance. *R.* 4 *Co.* 29. b. *Bunting*.

Or, *sibi & assignatis*. 4 *Co.* 29. b.

Or, *sibi & suis in villenagio*. *Kit.* 102. b.

So, by custom, a surrender to three *successive*, gives an estate to them, one after the other. *Kit.* 103. b.

So, a husband may surrender to the use of his wife; for tho' she takes by the surrenderor, yet it is *mediante domino*. *R.* 4 *Co.* 29. b. *Bunting*. *Adm.* 1 *Rol.* 317.

So, he may surrender to the use of his wife, remainder to himself *D.* 1 *Rol.* 317.

So, to the use of *A.* and his wife for life, with a contingent remainder to the right heirs of the body of himself and his wife. *R. 1. Rol. 238. 317. 438.*

So, by custom, a *feme covert* may surrender to the use of her will, and devise to her husband. *R. 2. Brown. 218.*

So, a man may surrender to such use as the lord shall name. *R. Lit. 26.*

So, he may surrender to *A.* in trust for *B.* *Adm. All. 14.*

And the trust shall be executed in *Chancery.* *All. 15.*

But if *B.* is an alien, the king shall have the trust. *Semb. All. 15.*

Yet the king cannot seize it without a decree. *Semb. All. 16.*

(F 9.) *To the use of a will.*] A copyhold does not pass by devise, without a surrender, but it ought to be surrendered to the use of the last will and testament. *4 Co. 24. b. 3 T. R. 169.*

And therefore, if the lord grants the inheritance of a copyhold, the copyholder cannot devise; for the grantee cannot take a surrender. *R. 4 Co. 24. b. Murrel.*

But a devisee takes by the surrender, not by the will, which is only declaratory of the uses. *R. 1. Bul. 200. R. 2. Cro. 199. D. 2. Rol. 383.*

And therefore, if there be joint-tenants of a copyhold, and one surrenders to the use of his will, and devises to *A.* in fee, and dies; *A.* takes, for by the surrender the jointure was severed. *Co. L. 59. b. 2 Rol. 383.*

If a copyholder surrenders to the use of his will, and devises to *A.* for life, and that he shall name two, who shall sell; *A.* has not a fee, but only an authority to name two vendors, and the vendee shall be in by the will, without a new surrender. *R. 2. Cro. 199.*

If he surrenders to the use of a will, which he shall leave with *A.* It is good as to his will, tho' it is not left with *A.* if he dies before the devisor. *R. Lit. 26.*

So, though *A.* does not die in the life of the devisor. *Dub. Lit. 26.*

[But a copyhold surrendered to the use of a will, does not vest in the appointee dying in the life of the testator. *2 Vezey, 77.*]

[Nor will a surrender to such uses as he shall appoint, give effect to a will made before. *Ambler, 299.*]

So, a custom that a *feme-covert* may surrender to the use of her will, and by her testament devise, is good though she devises to her husband. *R. 2. Brown. 218. 3 Leo. 81. Vide Godb. 14. 143.*

When a copyholder surrenders to the use of his will, it remains in the copyholder, and not in the lord. *R. 4 Co. 23. Cro. El. 442. 349.*

And if the copyholder does not afterwards make his will, but surrenders to *A.* and his heirs, the surrender to *A.* is good. *R. Cro. El. 442.*

So, if he does not make a will, nor a last surrender, the copyhold descends to his heir. *Cro. El. 442.*

So, if he makes a will, and devises for life or in tail, all the estate not devised descends to the heir. *R. Cro. El. 148. 1 Leo. 174.*

But if a copyholder by will devises to his wife for life, and that she shall sell the reversion, and afterwards surrenders to his wife for life, according to his will; she may sell. *R. Cro. El. 68.*

If he devises part of his copyhold to his wife, and afterwards surrenders the whole to the use of his will; this does not enlarge the devise. *R. 3 Leo. 18.*

A custom

A custom that a testament shall be presented at the next court, otherwise that it shall be void, is good.

So, that it shall be presented within a year and a day. *R. Cart.* 72. 86.

And upon such custom, if the testament is not presented by the devisee for life, it is void as to him in remainder. *Semb. Cart.* 73. 86.

Tho' devisee be an infant. *Semb. Cart.* 86.

[A copyhold surrendered to the use of a will passes by the general words, *all my real estate.* 2 *Ves.* 164.]

[But otherwise where there is no surrender, unless testator has but one copyhold and no freehold, and then only in favour of wife, children, and creditors. *Id. ibid.*

(F 10.) Presentment of a Surrender.

By surrender the copyhold estate passes to the lord, (being made out of court,) upon a tacit condition, that it be presented at the next court, according to the custom of the manor. *Co. L.* 62. a.

And if it be not presented at the next court, it is void. *Ibid.*

[By special custom it may be presented at any subsequent court. *Moore v. Moore, T.* 1755, 2 *Vezey*, 596.]

And it may be presented at the next court, tho' the surrenderor dies before. *R. 4 Co.* 29. b. *Bunting.* 1 *Rol.* 501. l. 30. *Co. L.* 62. a.

So, a surrender to two tenants, &c. may be presented at the next court, tho' the tenants die before, it being proved that there was such a surrender. *4 Co.* 29. b. *Bunting.* *R. 3 Bul.* 216. 2 *Cro.* 403. 1 *Rol.* 501. l. 30.

Unless the presentment after the tenant's death be restrained by special custom. *D. 3 Bul.* 218.

The whole surrender ought to be presented; for if it was upon condition, and the condition is omitted, the whole presentment is void. *R. 4 Co.* 25. *Kite.*

But by special custom, that the surrender be presented within a year, it is sufficient, if it is presented within the year, tho' it be not at the next court. *Adm 3 Bul.* 215.

Or, that it be presented at the next court, or within a year, or at the next court after the year. *Semb. 5 Co.* 84. *Cro. El.* 668.

So, a custom, that the presentment be, of a surrender to the use of a will, at the next court after the death of the surrenderor, is good; though it be not at the next after the surrender made. *Adm. per Holt, at the Assizes, 3 Ann. inter Stint and Blount. (Vide Godb.* 143.)

So, the presentment of a surrender to the use of a will, at the next court after the death of the surrenderor, tho' it be not the next after the surrender made, is good, without a special custom. *Semb. by the general expressions of Co. L.* 59. b. 1 *Rol.* 501. l. 35. *Per Wiseman, 28 El. Per Lechmere, at the Assizes, 4 Jul. 4 W. & M. inter Carpenter and Ilton, at Chelmsford. Dub. per Holt, at the Assizes, 3 Ann. inter Stint and Blount.*

So, a surrender upon valuable consideration, if it be not presented, shall be aided against a voluntary disposition to another. *R. Ca. Ch.* 171.

So, an agreement to sell or mortgage for money, tho' there be no surrender. *Ibid.*

(F 11.) *In whom the estate is till presentment.*] After a surrender, the estate remains in the surrenderor till presentment. *R. Cro. El. 349. R. 2 Cro. 403. 3 Bul. 218. R. Cro. Car. 283. 1 Rol. 502. l. 25.*

And till admittance. *D. Cro. El. 349. R. Cro. Car. 283. Adm. 3 Lev. 385.*

For nothing passes till presentment or admittance. *2 Cro. 403. 3 Bul. 238.*

And if the surrenderor dies before admittance, it descends to his heir. *R. Cro. El. 349. R. 2 Cro. 403. 3 Bul. 217. R. Cro. Car. 283. D. 1 Vent. 261.*

And the surrenderor, before presentment of the first surrender, may again surrender to another. *R. Cro. Car. 283. 1 Rol. 500. l. 5. Jon. 306.*

And if he surrenders to *A.* and his heirs, and before presentment again surrenders to *A.* for life, and at the next court both surrenders are presented, and *A.* is admitted upon the second, he shall have it only for life. *R. 1 Rol. 499. l. 55. Lane, 99.*

So, if a copyholder surrenders to *A.* for life, and afterwards to the use of his will; the fee remains in the surrenderor, and not in the lord. *R. 4 Co. 23. a. Fitch. Cro. El. 442. 349.*

And the surrenderor may afterwards surrender to another in fee. *4 Co. 23. a. Cro. El. 442.*

(F 12.) When a Surrender may be revoked.

So, a surrenderor may revoke a surrender made without valuable consideration, before presentment. *Kit. 82. Dub. per Holt, 3 Ann. inter Stint and Blount.*

So, after presentment, before admittance. *Kit. 82.*

And the revocation may be by *parol*.

[So a surrender made by a woman when sole, to the use of her will, is revoked, or at least suspended by another marriage. *Ambler, 628.*]

(F 13.) When not.

But a surrender upon valuable consideration cannot be revoked, *Kit. 82.*

So, if a copyholder makes a surrender to *A.* and afterwards to *B.* and both are presented at the next court; *A.* shall be admitted. *R. Cro. Car. 283. 1 Rol. 500. l. 10.*

So, if *B.* was admitted upon the second surrender, and then the former surrender to *A.* is presented at the next court, and *A.* is admitted; he shall avoid the admittance of *B.* *Semb. Cro. Car. 284. cited so per Pollexfen, Pol. 50.*

So, if a surrender be for a mortgage, and before presentment the surrenderor becomes bankrupt; it shall be preferred to the assignee of the bankrupt. *Sal. 449. (Vide 2 Ver. 564.)*

Tho' the surrender never was presented, it shall be preferred in equity; for it is a lien upon the land. *R. per Cowper, Sal. 449. [1 P. W. 280.]*

And if the surrender is presented at the next court, tho' there be no admittance upon it, the land is bound, so that all mesne acts shall be avoided. *R. Cro. Car. 284.*

As if a copyholder, where by custom the wife shall have free-bench,

bench, surrenders to *A.*, and the surrender is presented, and then he dies, and *A.* is afterwards admitted; he shall avoid the free-bench, for his admittance has relation to the surrender. *R. 3 Lev. 385.*

(F 14.) How a Surrender operates.

[The same construction of words must take place as in other law-conveyances; and the intent of the party is not sufficient, as in a will. 1 *P. W. 16. Sutton v. Stone, M. 1740, 2 Atkyns, 101. Lovel v. Lovel, M. 1743, 3 Atkyns, 11. 3 T. R. 473.*]

[Therefore, where a copyhold was surrendered to the use of *baron* and *feme* for their lives, *et heredum et assignatorum* of the said *baron* and *feme*, and for default of such issue, to the right heirs of *A.*, this was held to be an estate in fee, and not an entail in the *baron* and *feme*. 1 *P. W. 71.*]

[*A.* seised in fee surrenders to the use of *B.* his future wife, and the heirs of their two bodies, for default to the right heirs of *A.* She takes estate for life with contingent remainders to the heirs of their two bodies. *Frogmorton v. Wharrey, T. 10 G. 3. and M. 11 G. 3. 3 Willf. 125. 144.*]

[Surrender is the conveyance of the ownership of the estate: admission only form, and relates back to the surrender. *Roe v. Griffiths, M. 7 G. 3. 4 B. M. 1952.*]

Nothing passes by a surrender, but what is sufficient to supply the use limited; and when the *cestuy que use* is admitted, he shall be in by the surrenderor, not by the lord. *Co. L. 59. b.*

And therefore, if a copyholder surrenders for life, or in tail, the fee remains in him. *D. Cro. El. 442.*

And if a copyholder surrenders to *A.* for life, nothing passes but what is sufficient to supply the estate for life; and when *A.* dies, the reversioner shall have the reversion without any fine for re-admittance. *Per Ch. J. 9 Co. 107. a. M. Podger. 1 Rol. 504. l. 8. R. Cro. Car. 205. Per Wray, 1 Leo. 175.*

But if a husband seised in right of his wife for life, with remainder over, surrenders to *A.* for life, who dies in the life of the husband; the lord shall have it for the life of the husband; for he has surrendered his whole estate, and cannot have it again against his own grant, and the remainder he cannot have without a grant to him. *Dy. 264. a. 1 Rol. 504. l. 15.*

So, if any copyholder only for life surrenders to *A.* generally, who dies after admittance; the lord shall have it during the life of his copyholder. *R. 1 Rol. 504. l. 20. Cro. Car. 204. Jon. 229. 1 Sal. 188, 189. Mod. Ca. 68.*

So, if a copyholder for life, with remainder over in fee, surrenders to *A.* *Cont. per North, 1 Mod. 200. Acc. 2 Rol. 794. l. 35.*

And if the remainder be contingent, a surrender by a copyholder for life to another in fee, does not defeat the remainder. *Semb. 2 Rol. 794. l. 45. Vide ante, (D 1.)*

When a man surrenders to the use of his will, he has the whole copyhold and interest in himself. *Vide ante, (F 9.)*

And therefore, if a copyholder surrenders to the use of himself for life, and afterwards to his son for life, and afterwards to the use of his will, and does not make a will, but afterwards surrenders to *A.* and his heirs; the surrender to *A.* is good. *R. Cro. El. 442.*

So, if he makes a will, and devises to *A.* for life, and afterwards to *B.* in tail, and says nothing of the fee; it descends to the heir. *R. Cro. El.* 148.

So, if a copyholder surrenders to such use as the lord shall name, who limits it to *A.* for life; the fee results to the copyholder. *R. Lit.* 26.

If a copyholder in reversion, or remainder, expectant upon an estate for life, surrenders to him, who has it for life, for his life, and afterwards to himself and his wife in fee; this operates to them by way of a present estate, and not as a remainder. *R. 1 Sand.* 151. *1 Sid.* 350.

If a copyholder surrenders to himself for life, and afterwards to *A.* in tail, and afterwards to his own right heirs; his heir takes the fee by descent. *1 Leo.* 101, 102.

But if he surrenders to *A.* for life, and afterwards to his own right heirs; his heir takes by purchase. *R. 1 Leo.* 102.

If a surrender be to *A.* for life, and afterwards to the heirs of the body of *A.* by her husband begotten; it is a tail executed in *A.* *Per Coke, 1 Rol.* 239.

If it be to the wife for life, and afterwards to the right heirs of the husband and wife, and the husband enters; he shall be seised of a moiety in right of his wife in fee; for the remainder will be executed for a moiety. *R. 3 Leo.* 4.

[If *A.* surrenders copyhold to his brother *B.* till *C.*, son of *D.*, brother to *A.*, attains twenty-one, and after such age to *C.*, his heirs and assigns; and an agreement is indorsed, that *B.* is to receive the rents till *C.* attains twenty-one, and then to account to him for the same, but not before: and *A.* dies without issue, *C.* dies an infant without issue, or brother or sister born at his death, and *B.* is heir at law to *A.* and *C.*, and dies; the heir at law of *B.* shall take the premises, and shall not account for the profits. *Lovel v. Lovel, M.* 1743, 3 *Atkyns*, 11.]

[A surrender to the use of a will operates on the estate only which the surrenderor has at the time. *Doe v. Cowling, B. R. M.* 35 *Geo.* 3. 6 *T. R.* 63.]

[Therefore if a copyholder, having an estate *pur autre vie*, surrender all his estate in possession, remainder, or expectancy, to the use of his will, and afterwards take the fee by descent, and then dispose of the fee by will, the fee does not pass. *Ibid.*]

(G) Admittance.

(G 1.) What may be done before Admittance.

THE heir may take the profits, have trespass, surrender, &c. before admittance. *Vide ante*, (D 2.)

The assignee of a copyhold, upon the statute of bankrupts, has an estate in him before admittance. *R. Cro. Car.* 569. *Jon.* 451, 2.

And he shall avoid all mesne acts, between the assignment and admittance, for when he is admitted, it has relation to the bargain and sale; and therefore if the bankrupt afterwards dies, and his wife is admitted, the assignee after admittance shall avoid it. *R. Cro. Car.* 569.

But by the *st.* 13 *El.* 7. *f.* 3. Assignee of a copyhold shall not enter
or

or take the profits, till he hath agreed with the lord for his fine, who at the next court shall admit him tenant.

If by custom the wife has free-bench, she shall enter and lease for a year, before admittance. *Hob.* 181. *R.* 1 *Rel.* 502. *l.* 10.

So, if the lord refuses admittance, the copyholder shall have all actions, as if he was admitted. *Per two J.* *Hob.* 181.

But a surrenderee cannot enter and take the profits, before admittance. *R. Cro. El.* 349.

Nor after presentment of a surrender to him. *Per two J.* *Poph.* 128.

Nor have an action. *Cro. El.* 349.

Nor make a surrender. *R. Yel.* 145. *Per two J.* *Poph.* 128. *R.* 1 *Brow.* 143.

Nor shall he be sworn on the homage. *Kit.* 87. *b.*

[The surrenderor, before admittance, is considered as a trustee for the surrenderee, and as between them admittance is not necessary to maintain an ejectment; because the title to copyhold lands relates back from the time of the admittance to the surrender, and therefore, the surrenderee may recover in ejectment against the surrenderor on a demise laid between the times of surrender and admittance. 1 *Term Rep.* 600.]

[But whether the surrenderee, before admittance, can recover against the lord of a stranger? *Quere.* *Id. ibid.*]

Tho' a surrender be by a copyholder to his youngest son, he can do nothing before admittance. *R. Lane,* 20.

So, where there is a custom of *Borough-English*, if the father surrenders to him and his heirs and dies, and the youngest son enters; the eldest son cannot enter before admittance. *R.* 1 *Rel.* 502. *l.* 20.

So, where by custom a copyholder for life shall name his successor, the nominee cannot enter before admittance. *Per Coke,* 2 *Bul.* 338.

So, by custom, the surrenderee shall not be admitted till proclamation that the next of blood, or he who has land adjoining Eastward, comes, and he pays all that the surrenderee swears he ought to pay with his costs, he shall be admitted, and not the surrenderee. *Kit.* 102. *b.*

Yet if the steward refuses to admit a surrenderee, he may enter and plead, in defence of his title, to the ejectment by the lord, without admittance; for the lord is party to the wrong. *Semb. per four J.* *Yel.* 16. *R. Hob.* 181.

(G 2.) When necessary.

Every copyholder ought to be admitted tenant to his copyhold. *Pl. Com.* 529. *b.*

But till presentment of the death, and proclamation thereupon, the heir need not be admitted. 1 *Leo.* 100. 3 *Leo.* 221.

And if the heir upon proclamation does not come to be admitted, the lord may seize *quousq;* he comes without a special custom. *D.* 1 *Lev.* 63.

[If copyhold surrendered to the use of will is devised to six persons, and one offers himself to be admitted, and the lord refuses, he cannot seize *quousque;* he should admit him, and then proceed for his whole fine. *Roe v. Hutton,* P. 3 G. 3. 2 *Wils.* 162.]

And

And by special custom, if he comes not after three proclamations, at three several courts, the lord may seize it as forfeited. *Adm. 8 Co. 99.*

But not without such custom. *R. 1 Lev. 63.*

Or, if he does not come within a year and a day. *Pl. Com. 372. a.*

So, a custom, that he to whose use a surrender is made shall come to be admitted after three proclamations, otherwise his land shall be forfeited, is good. *R. 1 Rol. 568. l. 20. Noy, 42. Adm. 3 Mod. 221.*

Yet, the proclamation ought to be, that he come to be admitted to such copyhold, specially named; for it is not sufficient that he come to be admitted, generally. *Dub. 1 Lev. 63.*

But a custom to seize as forfeited, for not claiming to be admitted, does not bind the heir, if he was beyond sea, *non compos*, or in prison at the time. *R. 8 Co. 100. 2 Cro. 226. Per three J. 2 Cro. 101. R. Godb. 268.*

Or, if he was an infant. *R. 8 Co. 100. 1 Leo. 100. R. 3 Leo. 221. Per four J. Coke cont. 2 Cro. 226. R. in C. B. and affirmed by three J. in Error, 3 Mod. 223. Sho. 31. 1 Sal. 386. Carth. 44.*

But he may forfeit *quousq;* he be admitted, though an infant. *Per Williams, 2 Cro. 226. Per Holt and admitted per Eyre, if there be a special custom for it, but Dolbin cont. 3 Mod. 223. 1 Sal. 386.*

And if he be within the realm at the time of the descent, though he goes out before proclamation, he shall forfeit. *Adm. 2 Cro. 101.*

(G 3.) When not.

If a copyholder surrenders to *A.* for life, who dies, he shall have it again without re-admittance. *Vide ante, (F 14.)*

So, if a copyholder makes a lease for years by licence, and the lessee dies, his executor needs no admittance. *R. Mo. 128.*

So, if there be a copyholder for years who dies, his executor needs no admittance. *R. Mo. 128. D. 1 Leo. 4.*

So, if husband be admitted with his wife, where by custom he shall be tenant by the curtesy; if the wife dies, the husband need not be re-admitted. *1 Leo. 4.*

So, the admittance of tenant for life, is an admission of him in remainder; so that the lord does not lose his fine. *4 Co. 22. b. Brown. R. 4 Co. 23. a. Fitch. Cro. El. 504. 662. Dub. 1 Rol. 505. Y. R. Mo. 358. 465. R. 2 Cro. 31. R. 1 Vent. 260.*

So, the admittance of a copyholder for years, is an admittance of him in remainder, after the years. *R. 1 Vent. 260. R. 1 Mod. 120.*

(G 4.) What shall be an Admittance.

Any words, which shew that the lord accepts him for his tenant, are sufficient.

So, if the lord, having notice of a surrender, accepts rent of the surrenderee, it is an admittance in law. *R. 1 Rol. 505. l. 26.*

Though the acceptance be out of court. *1 Rol. 505. l. 27.*

But it is necessary that the surrender be presented before the acceptance. *R. 2 Cro. 403. 3 Bul. 219.*

So, if a surrenderee at another court makes a surrender in court; for the allowance by the lord to make a surrender, amounts to an admittance.

mittance. *Dub.* 38 *El.* *R.* 41 *El.* 1 *Rol.* 505. l. 20. *Dub.* 3 *Bul.* 240.

But there ought to be an exprefs acceptance of a certain person which amounts to an admittance; for if a surrenderee, before his admittance, surrenders to *A.* who is admitted, it does not amount to an admittance of the surrenderee. *R. Yel.* 145. 1 *Brow.* 143.

So, if a surrender be to the use of *B.*, and the steward inrols it, and gives him a copy of it without more, it is no admittance; for it ought to be an act done. *R. Bridg.* 82. *Popb.* 127.

Joint-tenants take *per my & per tout*; and the admittance of one of several joint-tenants supplies the whole tenure to the lord; but it is otherwise in the case of parceners. *Per Lord Kenyon C. J. Tarrant v. Hellier, B. R. E.* 29 *Geo.* 3. 3 *T. R.* 165.

(G 5.) When it shall be.

The lord may admit before a surrender is presented. *R.* 1 *Rol.* 502. l. 30.

But the heir is not bound to be admitted till the death of his ancestor is presented, and proclamation made for his admittance. 4 *Leo.* 31.

(G 6.) By whom it shall be.

Every lord having possession of a manor by right, or by wrong, may make admittances. *Vide ante, (C. 3, 4.)*

And every steward having colour of authority. *Vide ante, (C 5.)*

(G 7.) In what Place.

The lord may make an admittance in court.

Or, at any place out of court, and out of the manor. *R.* 4 *Co.* 26. b.

So, the steward may make an admittance out of court, at any place within the manor, as well as in court. 1 *Rol.* 505. l. 15.

But not out of the manor. *R.* 4 *Co.* 26. b.

Unless where, by custom, the court has been held out of the manor. *Cro. Car.* 367. *Vide post. (R 4.)*

(G 8.) By Attorney.

The lord may admit a copyholder by attorney, as well as in person. *R.* 9 *Co.* 76. 1 *Rol.* 505. l. 5. 10.

But the lord may refuse to admit by attorney; because his tenant ought to do fealty, which he cannot by attorney. 9 *Co.* 76. 1 *Rol.* 505. l. 5.

(G 9.) How it shall be made.

An admittance ought to be pursuant to the surrender; for the lord is only an instrument, and the surrenderee, when admitted, is in by the surrenderor. *R.* 4 *Co.* 27. b. *Taverner.* 4 *Co.* 28. b. *Westwick.*

And therefore, if a surrender be to *A.* for life, and he is admitted to him and his heirs; he has it only for life, the reversion being in the surrenderor. *R.* 4 *Co.* 29. b. *Bunting, R.* 1 *Rol.* 594. l. 2.

If

If a surrender be to *A.*, and *A.* and his wife are admitted, it is void to the wife, without a special custom. *R. 4 Co. 28. b. Westwick.*

So, if a surrender be to *A.*, and he and a stranger are admitted; it is void to the stranger, and the whole vests in *A.* *4 Co. 28. b.*

So, if a surrender be to *A.* and *B.* for life, remainder to the heirs of the body of *B.* and the surrenderor, and *A.* and *B.* are admitted in fee; they have it only for life. *R. 1 Rol. 438.*

So, if a surrender is absolute, and the admittance upon condition; he has it absolutely. *4 Co. 28. b.*

So, if a surrender is of such and such copyholds, and the admittance is to all copyholds of the surrenderor; nothing vests but the particulars mentioned in the surrender. *R. Dy. 251. b. 1 Rol. 504. l. 45.*

So, if a surrender be to *A.* and his heirs; and *A.* dies before admittance; the lord may admit the heir. *1 Rol. 504. l. 40.*

So, if a surrender be to *A.*, remainder to *B.*, and *A.* dies before presentment of the surrender; *B.* shall be admitted. *R. Dy. 251. a. 1 Rol. 504. l. 35.*

So, if a surrender be to *A.* for years, remainder to his right heirs; the admittance of *A.* will be the admittance of the heir, so that if he dies, such admittance of the heir makes a *possessio fratris*. *R. 2 Lev. 107.*

(G 10.) The Lord compellable to admit.

If the lord refuses to admit, he shall be compelled in *Chancery*. *R. 2 Cro. 368. Per Dodd, 2 Rol. 274. [Cary, 3.]*

So, if a surrender be to the lord, who is *dominus pro tempore*, and then his interest determines; the lord *paramount* shall be compelled to make an admittance thereupon. *Co. L. 59. b.*

But an action upon the case does not lie against the lord, if he refuses to admit; for there is no remedy but in equity. *R. 2 Cro. 368. 1 Rol. 108. l. 20. 30. 2 Bul. 337.*

[If the lord of a manor refuse to admit a surrenderee, on account of a disagreement about the fine to be paid, *B. R.* will grant a *mandamus* to compel the lord to admit, without examining the right to the fine. *2 Term Rep. 484. Vid. infra, (H 1.)*]

[But they will not grant a *mandamus* to admit a copyholder by descent, because, without admittance he has a complete title against all the world but the lord. *2 Term Rep. 198.*]

So, if by custom, the lord ought to admit to a copyhold whom the copyholder names for his successor, and the lord refuses, an action upon the case does not lie. *R. Mo. 842. R. 2 Cro. 368. 2 Bul. 337. 1 Rol. 125. 195.*

(G 11.) Of what Effect it shall be.

If a man be admitted to a copyhold upon a void presentment, he has thereby the customary estate and title to the possession, and is capable of a release from him who has the right. *R. 4 Co. 25. Kite. 1 Rol. 504. l. 50.*

But if he enters upon a copyhold of a manor in the hands of the king, he has no interest, but possession against a stranger. *R. 3 Leo. 221.*

So, if a copyholder in remainder enters upon a copyhold for life, he

he has not the customary interest for life, but is a disseisor; and if he afterwards surrenders, it avails nothing. *R. 1 Mod. 199.*

If a copyholder leases for years, and afterwards surrenders two parts of the reversion, the surrenderee, being admitted, shall distrain for two parts of the rent, without attornment or notice; for the surrender is notorious. *R. Ray. 18. R. Hob. 177.*

(H) Fine.

(H 1.) When due.

BY custom, a fine shall be paid to the lord upon every alteration of his tenant: and therefore, if a copyholder in fee dies, a fine is due to the lord upon admittance of the heir. *Co. L. 59. b. Kit. 122. a.*

[But the lord is not entitled to the fine till after admittance. *2 Term Rep. 485. Vide supra, (G 10.)*]

And if the heir dies before admittance, it shall not prejudice the lord as to his fine.

Or, if he surrenders before admittance. *4 Co. 22. b.*

[But if copyholder surrenders to the use of his will, and by will orders and directs two trustees to make sale of his copyhold, and apply the money to certain purposes; they may sell without being admitted, and the lord shall admit the vendee, and have but one fine. *Holder v. Preston, P. 9 G. 3. 2 Wilf. 400.*]

[So if a copyholder covenant to assign and surrender to *B.*, which covenant is presented by the homage, but before any surrender, *B.* assigns his interest to *C.*, to whom the copyholder surrenders; *C.* has a right to be admitted on the payment of one fine. *2 Term Rep. 484.*]

So, if a copyholder makes a surrender, a fine is due upon admittance of the surrenderee. *Co. L. 59. b. Kit. 122. a.*

So, if a wife, by custom, has the whole or part of a copyhold for her dower; upon her admission a fine shall be paid. *Kit. 123. a.*

But half a fine is commonly taken; but that is according to the custom of the manor. *Ibid.*

So, if a surrender be to *A.* by way of mortgage upon condition; after the condition broken, the lord shall compel *A.* to be admitted, and pay a fine, though *A.* will renew the surrender. *Dub. 2 Ver. 367, 8.*

So, if a surrender be to *A.* for life, and afterwards to *B.* for life, and afterwards to *C.* in fee, a fine is due for them in remainder; for tho' the admittance of *A.* is an admittance of them in remainder, yet it shall not prejudice the lord for his fine. *D. 3 Co. 22. Brown. R. 4 Co. 23. Finch. Cont. per Poph. 1 Rol. 505. l. 50. R. cont. Mo. 358. 465. D. acc. 1 Vent. 260. Per Kit. acc. but others cont. Kit. 122. b. R. 1 Mod. 120.*

And the lord may set a fine for the particular estate, and another for the remainder. *D. 1 Vent. 260.*

But there ought to be a special custom, otherwise a fine is not due for a remainder. *Per two J. 3 Lev. 308. Per two J. Cro. El. 504.*

And if another fine is set for a remainder, it is only half. *Kit. 122. b.*

And it need not be paid till the remainder comes into possession. *Per Wild, 1 Vent. 260.*

• If a copyhold be granted to *A.* for years, who dies during the term; the executor shall be admitted, and pay a fine. *Per Weston, others cont. 3 Leo. 9. [Acc. 1 Bur. 206. 218.]*

So, by custom, a fine may be due upon the death of the lord. *Co. L. 59. b.*

But not upon the alienation of the lord; for that would be unreasonable. *Ibid.*

[In a manor where by custom a general fine is due from all the tenants, on the death of the last admitting lord; husband tenant for life by virtue of marriage-settlement is entitled to the fines on the death of his wife, the last admitting lady. *D. Somerset v. France, M. 12 G. Str. 654. Fort. 41.*]

But if two or three are admitted together, one fine only is due; for they make but one tenant. *Kit. 122. a.*

So, if a surrender be to husband and wife, and the heirs of the husband, there is but one fine due upon admittance of the husband and wife. *Ibid.*

So, if a copyholder surrenders to himself for life, and afterwards to *B.* and his heirs, and dies before the next court: *B.* shall pay but one fine upon his admittance. *Kit. 122. b.*

So, upon a common recovery, there shall be but one fine paid; for the recoverors are in the *post*, and pay no fine. *Ibid.*

So, if a copyholder for life and he in reversion, or remainder, join in a surrender, the surrenderee shall pay but one fine. *Kit. 123. a.*

So, if there be no new tenant, no fine shall be paid: and therefore, if a copyholder surrenders to *A.* for life, who dies; the surrenderor shall pay no fine to be re-admitted. *9 Co. 107. 1 Rol. 505. l. 45.*

So, if one joint-tenant dies, the survivor shall have the whole, without paying any fine to be admitted. *Kit. 122. a.*

So, if a surrender be upon condition, and the surrenderor enters for the condition broken; he shall not pay any fine. *Kit. 123. a.*

If a woman has a copyhold for the nonage of her son, and takes a husband, and dies before her son is of full age; the husband shall have it without a new fine. *Per two J. 3 Leo. 9.*

(H 2.) When to be set, and how.

No fine shall be imposed till admittance. *1 Rol. 506. A. for the admittance is the cause of the fine. R. 4 Co. 28. a. Hubbard. D. 1 Vent. 260.*

If a copyholder holds several copyholds, by several services, there ought to be upon every one a several fine. *R. 4 Co. 27, 8. Hubbard, for he may pay one and forfeit for the other. Ibid. Cro. El. 779. Mo. 622.*

So, if all the several copyholds are surrendered to one *tenend* per *antiqua servitia*; for the tenures remain several, and the fines ought to be several. *R. 4 Co. 28. a. Hubbard.*

[One gross fine cannot be assessed on the admission to several copyhold tenements; and if it be so stated in the declaration in an action for the fine, it is error, and not cured by verdict. *Doug. 722.*]

(H 3.) Fine certain.

A fine may be certain, by custom. *Co. L. 59. b.*

If the custom allows for a fine a year's value of the land, it is good; for the value is sufficiently certain, and triable by a jury. *R.*

3 Lev. 255. 3 Mod. 133. Carth. 13.

So, a fine of one penny for 100 acres or more, is good. *Kit. 103. a.*

So, 6s. 8d. for every messuage, cottage, or toft, or every acre of land, tho' as much be paid for one as the other. *Kit. 103. a.*

So, a fine at the will of the lord for the first purchase, and nothing afterwards. *Kit. 103. b.*

If the lord demands a fine certain, it is no evidence of its uncertainty, that he has paid less; for the lord may take a less sum. *D.*

2 Bul. 32. D. cont. per Richardson, Lit. 252.

Otherwise, if he has paid more. *D. 2 Bul. 32.*

If a jury find a fine certain, *Chancery* will decree it to be an uncertain fine upon examination of the rolls. *D. Lit. 252.*

If a fine certain hath been paid from the time of *H. 6.* and it appears by the roll to have been uncertain before; it is not a fine certain. *Godb. 265.*

A fine certain ought to be paid immediately. *4 Co. 28. a. Hubbard. Cro. El. 779. Mo. 623.*

(H 4.) Fine uncertain.

So, sometimes a fine, by custom, is uncertain, and arbitrary. *Co. L. 59. b.*

Or, by custom, may be assessed by the homage, where the lord does not agree. *Noy, 2, 3.*

But tho' it is uncertain, it ought to be reasonable; otherwise the copyholder is not compellable to pay it. *Co. L. 59. b. R. 4 Co. 27. b. Hubbard. 1 Rol. 507. l. 25. R. Mo. 622. Cro. El. 779. R. Co. Ent. 647. c.*

Whether a fine be reasonable or not, shall be determined by the justices upon the circumstances appearing in the case. *Co. L. 59. b. R. 4 Co. 27. b. Hubbard. Mo. 623.*

And therefore, if an action be brought against a copyholder by the lord, it shall be referred to the court upon demurrer. *4 Co. 27. a. Co. Ent. 647. c.*

Or, the defendant may plead, not guilty, and upon proof of the value of the land, and other evidence, the court will judge. *4 Co. 27. a. Hob. 135. Co. Ent. 647. c.*

For, if a copyholder prays a mitigation, it does not conclude him, but that he may afterwards insist on the unreasonableness of the fine. *1 Rol. 507. l. 30.*

And there may be a custom, that if the lord and surrenderee do not agree for the fine, the tenants ought to assess it. *R. 1 Rol. 48.*

Yet if a copyholder brings trespass against his lord, who justifies his entry for non-payment of a fine; it ought to be shewn on the part of the copyholder, that it is unreasonable. *R. Hob. 135.*

If the lord demands 5*l.* upon admittance to a copyholder of 30*s.* *per ann.* it is unreasonable. *R. 1 Rol. 75.*

So, if he demands for an admittance upon a descent, above two years value. *Semb. 2 Mod. 230.* But two years value is reasonable. *R. Ch. R. 464. Adm. 2 Bul. 32. [Doug. 724. n. to 727. n. And the lord is not bound to make any deduction on account of the land-tax. Doug. ibid.]*

So,

So, if he demands two years and a half rent for an admittance upon a surrender; for one year and a half is sufficient. *R. Cro. Car.* 196.

Or, the value of two years for an admittance upon a surrender. *R. Co. Ent.* 647. c.

[Fines shall be set according to the present improved value, not according to the rent under a lease then subsisting by licence of the lord. *Halton v. Hassell*, *P. 9 G. 2. Str.* 1042.]

[On admission to a mansion-house then unlet, (and which had continued unlet for eighteen years, when action was brought,) and a piece of land let at 7 *l. per annum*; 150 *l.* being the fine paid at the last admission, is not unreasonable. *Evelyn v. Chichester*, *T. 5 G. 3. 3 B. M.* 1717.]

But if by custom a fine is only due on the first purchase, and he and his heirs pay no fine for any land purchased there afterwards; the lord may set what fine he pleases. *Kit.* 103. b.

(H 5.) *When it shall be paid.*] A copyholder need not pay an uncertain fine immediately, for he cannot know how much it will be; and therefore, if the lord does not limit a time for payment, he shall have a convenient time. *R. 4 Co. 27. b. Hubbard. R. Cro. El.* 779. *Mo.* 622.

(H 6.) Remedy for a Fine.

(H 6.) *By action.*] If a copyholder refuses payment of the fine, debt lies against him. *Per two J. 1 Sid.* 58. *D. to be R. 2 Mod.* 230. 232. *Adm. and a declaration there in debt for refusal of such fine. Lut.* 597. *Cliff.* 244. *Vide Ent.* 176. *R. per three J. Holt cont.* 3 *Mod.* 240. 3 *Lev.* 261. *Sho.* 35. 2 *Vent.* 175.

So, by the executor of the lord. *Adm.* 3 *Lev.* 261.

So, an *indeb. assumpsit*. *R. 3 Mod.* 240. 3 *Lev.* 262. *Per three J. Holt cont. Sho.* 35.

[If a fine is assessed on admission of an infant, *assumpsit* would lie whilst he is an infant; (*Semb. per Yates J.*) but certainly after he comes of age, and has renounced the estate, but confirmed the transaction by enjoying. *Evelyn v. Chichester*, *T. 5 G. 3. 3 B. M.* 1717. *Dougl.* 727.]

[*Assumpsit* lies against a steward for the excess of a fine obtained by coercion. *Per Lord Kenyon Ch. J. Munt v. Stokes, B. R. H. 32 Geo. 3. 4 T. R.* 564.]

(H 7.) *By seizure as forfeited.*] And non-payment of a fine apparently reasonable, upon demand, is a forfeiture of the copyhold. *R. 1 Rol.* 507. *l. 20. Vide post.* (M 4.)

Tho' he pretends that he does not know what fine is due, &c. if such pretence is merely groundless and covinous. *Semb. Ray.* 42.

But if a fine is unreasonable, refusal of payment is no forfeiture. *1 Rol.* 507. *l. 25. Vide ante,* (H 4.)

Or, if it was dubious, whether a fine was reasonable or not, tho' it was adjudged reasonable. *D. 1 Rol.* 507. *l. 35. R. Ray.* 42. 2 *Mod.* 231.

So, if it be dubious, whether a fine is certain or uncertain; a refusal

refusal to pay an uncertain fine, if he tenders the fine certain, is no forfeiture. *R. 2 Cro. 617. R. Ray. 42. Semb. 2 Mod. 229.*

Yet if a day is appointed for payment of the fine, and he does not appear to excuse his default, tho' he tendered the fine certain at the time when it was assessed, it is a forfeiture. *R. 2 Cro. 617.*

So, if it is dubious, whether a fine be due or not, a refusal is no forfeiture. *R. 3 Lev. 309.*

So, it is no forfeiture; if there was not a demand from the person of the copyholder at the time limited for payment of the fine; or afterwards. *R. Hob. 135. Semb. Ray. 42. Cont. Co. Ent. 647. d. Acc. 2 Mod. 229.*

And if the lord justifies in trespass for non-payment of the fine, he ought to shew a demand. *R. Hob. 135.*

But the demand may be by the steward, without authority in writing. *R. 2 Mod. 229.*

So, it is no forfeiture, if there was not an express refusal. *Co. Ent. 647. Vide post. (M 4.)*

Or, if he refuses before the time appointed for payment, if he pays at the time. *Co. Ent. 647. d.*

Entry for a forfeiture ought to be by the lord, or another to his use.

But an entry may be without precept from the steward. *R. 2 Mod. 229.*

[Infants and femes covert, being entitled by descent, or by surrender to the use of a will, to be admitted to any copyhold, may, in their proper persons, or a feme-covert by her attorney, and an infant by his guardian, or, if he has no guardian, by his attorney, appear at one of the three next courts for the manor of which the copyhold premises are parcel and offer themselves to the lord or his steward to be admitted tenants. *St. 9 G. 1. c. 30. s. 1.*]

[In default of which appearance, either in proper person, or by attorney or guardian, the lord or his steward, after three several courts duly holden, and proclamations regularly made, may nominate and appoint, at any subsequent court, any fit person to be guardian or attorney for that purpose only, and by such guardian or attorney, admit such infant or feme-covert, and on such admittance may impose such fine as might have been set, if such infant had been of full age, or such feme-covert sole and unmarried. *Id. Ibid.*]

[On such admittance the fine imposed may be demanded by the bailiff or agent of the lord, by a note in writing signed by the lord or his steward, to be left with such infant or feme-covert, or with the guardian of the infant, or husband of the feme-covert, or with the occupier of the messuage; &c. to which such admittance was made. *s. 2.*]

[If the fine be not then paid, the lord may enter and receive the profits of the copyhold till he be satisfied, accounting for the overplus to the infant or feme-covert. *Id.*]

[If the guardian of the infant or husband of the feme-covert pay the fine, they may reimburse themselves out of the rents of the copyhold. *s. 4. Vide post. (M 4.)*]

(I 1.) A Copyholder shall alien only by Surrender.

A Copyholder has no other evidence for his tenements, but a copy of the court-roll. *Lit. S.* 75.

And therefore he cannot alien by deed.

Nor by will, without a surrender to the use of his will. *Vide ante*, (F 9.)

Unless there be a special custom, that he may demise without a surrender; for then it shall be good. *R. Lit.* 26. *Adm. Cart.* 71.

[But equity will supply the want of a surrender of a copyhold, in case it be devised for the payment of debts, or to a wife or younger children. 2 *P. W.* 490. 3 *P. W.* 96. 322. 1 *P. W.* 443. 1 *Brown.* 273. 2 *Brown.* 325. 2 *Ves.* 164. 582.]

[As to creditors, if one having lands, part freehold and part copyhold, devise all his *real* estate, or all his *lands* and *hereditaments*, for payment of debts, and die without surrendering to the use of his will, the freehold alone shall pass if that be sufficient, but if the freehold be not sufficient, the copyhold shall also be liable. 1 *P. W.* 443. 3 *P. W.* 322.]

[But if he charge all his *worldly estate* with his debts, the copyhold, though not surrendered to the use of his will, shall yet be applied to the payment of the debts *pari passu* with the freehold. 3 *P. W.* 96.]

[If a copyhold be devised to a younger child, and no surrender to the use of the will, tho' by the same will there be other provision made for the child, yet such copyhold being part of the provision will make it good, unless in a case where the eldest son and heir is totally disinherited; and tho' the devise be of a copyhold to a second son after the death of the eldest son without issue equity will supply the want of a surrender. 3 *P. W.* 283.]

[And this shall be extended to a grand-child. *Acc.* 2 *P. W.* 61. *D. cont.* 2 *Ves.* 582.]

[But it shall not extend to natural children, or cousins. 2 *Ves.* 282.]

[So, an equity of redemption of a copyhold shall pass by devise without surrender to the use of the will. 3 *P. W.* 358.]

[A copyhold surrendered to the use of a will is not within the statute of frauds, and therefore shall pass by a will attested by two witnesses or by one only. 2 *P. W.* 258. 2 *Brown.* 56.]

[So, of an equity of redemption of copyhold lands. *Acc. per Lord Hardwicke, Barnard, Ch. Rep.* 12. 2 *Atk.* 37. *Cont.* 2 *P. W.* 261.]

[But if the surrender be to the use of his *will to be attested* by three witnesses, a will not so attested will be void. *Ambler*, 684.]

So, if a copyholder be ousted by disseisin, he cannot release by deed to the disseisor; for he has not the customary estate upon which a release may enure, and it would be a prejudice to the lord, who would lose his fines and services. *R.* 4 *Co.* 25. *b. Kite.* *R.* 1 *Leo.* 102.

But if a man be admitted to a copyhold upon a void surrender; he, who has right, may release his right by deed, and by this release his right is extinct. *R.* 4 *Co.* 25. *Kite.* *Co. L.* 60. *a.*

So, if a copyholder surrender upon condition, he may afterwards release the condition by deed; for it cannot pass by surrender. *R.* 2 *Cro.* 36. *Vide* 4 *Co.* 25. *Kite.*

So, if a lord grants the inheritance of a copyhold to *A.* the copyholder

holder may release by deed to *A.* and thereby extinguish his customary interest. *R. 1 Leo. 102.*

So, if *A.* and *B.* are admitted to a copyhold jointly, one of them may pass his estate, by release, to his companion. *R. Winch. 3.*

So, a copyholder may sell or release his copyhold to the lord, by deed. *R. Hut. 65.*

[A recovery in *C. B.* is not good of copyhold lands; but of customary freeholds which pass by surrender in a borough court, it may. *1 Atkyns, 474. Vide post. (L):*]

(I 2.) But a Defect of the Roll shall be amended.

If there be an omission in an entry upon the roll, upon proof the roll shall be amended; for the roll does not conclude the copyholder to plead, or give in evidence the truth of the matter. *R. 4 Co. 25. Kite.*

And therefore, if a surrender upon condition be presented, and the condition is not entered upon the roll, it is not void; but the roll shall be amended. *Ibid.*

So, if the day of the court be mis-entered upon the roll, it shall be amended upon evidence, and shall not prejudice. *R. 1 Leo. 290.*

(K) What a Copyholder shall do, by Custom.

(K 1.) Shall be Tenant by the Curtesy.

WHAT a copyholder may, or ought to do, and what not, the custom directs. *Co. L. 63. a.*

And therefore, by special custom, the husband may be tenant by the curtesy of a copyhold, which he has in right of his wife. *Adm. 2 Leo. 208. 1 And. 192.*

But the custom shall be taken strictly, and therefore, tho' the husband of one, who had a copyhold at the time of the marriage, shall be tenant by the curtesy, yet he shall not, if the copyhold descends during the coverture. *R. 2 Leo. 109. 208. [Vide 1 P. W. 69. per two J. co.t.]*

(K 2.) Shall have Dower.

So, by special custom, the wife may have all the land of her husband, after his death for dower, or free-bench. *3 Lev. 385. Lit. S. 37.*

[Free-bench is a widow's estate in such lands as the husband dies seised of; not that he is seised of during the coverture, as dower is. *Godwin v. Winsmore, H. 1742. 2 Atkyns, 525. Vide Cowp. 481.*]

[Therefore, where by the custom a tenant for life of three lives had a power of surrendering the whole estate, and by licence from the lord demised by way of mortgage for 99 years, this was held to defeat the widow of her free-bench, though only one instance of a lease by licence was given in evidence. *Cowp. 481.*]

[If a man before marriage settles on his wife part of his real estate for jointure, in bar of all dower which she may claim out of any lands, tenements, messuages, and hereditaments, of which he is or shall be seised, of freehold or inheritance: she cannot claim her free-

bench in copyholds purchased afterwards. *Walker v. Walker, M. 1747. 1 Vezey, 54.]*

Or, a moiety, or third part of his land. *Co. L. 33. b.*

Or, only the fourth part of his land. *Ibid.*

Or, the whole, or a moiety, *dum sola & casta vixerit. Kit. 105.*

Or, during her widowhood. *Hob. 181. Noy, 2.*

Or, a woman being espoused when a virgin, shall have all the land whereof her husband dies seised. *Kit. 102. a.*

Or, the wife, by custom, shall have a third part of the rent of her husband's land, and not the land itself for her dower; as, at *Busb. Kit. 102. b.*

So, by custom, the wife surviving shall have the fee, and the husband *e converso. Noy, 2.*

And sometimes the wife, by custom, shall be admitted to her dower, after the death of her husband. *Vide Kit. 123. a.*

And shall pay a fine. *Vide ante, (H 1.)*

Sometimes she shall have it without admission, as an excessance from the estate of her husband. *Hob. 181.*

But a custom, that the wife shall have dower assigned by the homage, without the answer of the terre-tenant, or a plaint, or process against him, is ill. *Kit. 103. b.*

Or, that the wife shall have dower assigned of the land, where the husband, before marriage, has made a lease for life, rendering rent. *Kit. 103. b.*

When by custom, the wife has dower, she shall have all incidents; and therefore shall recover damages upon the *ft. of Merton*, if her husband dies seised. *R. 4 Co. 30. b. Shaw. Mo. 410. Cro. El. 426.*

But she shall not have debt for damages given upon the *ft. of Merton* in a court baron, except in the same court, or in *chancery. 4 Co. 30. b. Shaw. Yet Moore says, that three J. then held that debt lies in B. R. for damages assessed there above 40s. Mo. 410, 411.*

So, she shall not have ejectment for a third part of the copyhold before it be assigned in court. *Per Pemb. 2 Sho. 184.*

If the husband purchases the inheritance of his copyhold, which is conveyed to *A.* for his life, and afterwards to his right heirs; the dower of his wife is not extinct, for the customary estate of the husband remains for his life, out of which the dower is excessant. *R. Hob. 181. 1 Rol. 510. l. 40. 2 Cro. 126. 573. 2 Rol. 179.*

If the wife be divorced *a mensâ & thoro*, yet she shall have her dower. *R. Hob. 181.*

But if the husband makes a lease for years by licence, the wife after his death shall not avoid it; for the lessee also is in by the custom. *R. 2 Cro. 36. Mo. 758. [Corp. 481.]*

So, if the husband be a bankrupt, and his copyhold is sold by the commissioners, the wife shall not have her dower; for the husband did not die tenant, (as he ought by the custom,) tho' the bargainee was not admitted. *R. Cro. Car. 569.*

So, if the husband surrenders to *A.* and dies, and afterwards *A.* is admitted, the wife shall not have her dower; for upon admittance *A.* shall be in from the time of the surrender. *R. 3 Lev. 385. 1 Sal. 185. Skin. 406.*

So, if the husband, a copyholder for life, where, by custom, his wife

wife shall have dower, takes a lease for years; the copyhold is determined, and the wife shall not have dower. *R. Jon. 462.*

(K 3.) Shall make Leases.

A copyholder may make a lease for one year, without a licence. *R. 2 Cro. 402. 9 Co. 75. b.*

And thereupon may maintain an ejectment. *Mo. 539. 569. 128. Cont. Cro. El. 483. R. 4 Co. 26. Melwich. Vide post. (P 3.)*

And, by special custom, for three, nine, or twenty-one years. *Kit. 102. b.*

Or, for life, and forty years after. *Mo. 8.*

But a custom, that the lease shall be void, if the lessor dies, is good. *R. Lit. 235. Hut. 101.*

Otherwise, if the lessor alien. *Per two J. Lit. 235. Hut. 101.*

But a lease for several years, without licence from the lord, is not good without a special custom. *Per three J. Mo. 272. R. 1 Brown, 133.*

Tho' the lease be made without indenture, by *parol.* *1 Rol. 507. l. 45. Cro. El. 409. Mo. 392.*

Tho' it be not in possession, but commences *in futuro.* *R. 1 Rol. 507. l. 45. Cro. El. 499. Mo. 392.*

Tho' the lease be for one year & *sic de anno in annum* for ten years; for this is a lease for ten years. *R. 2 Cro. 301. 308. Vide post. (M 2.)*

Or, for a year & *sic de anno in annum*, during the life of the lessor; for this is a lease for two years at least. *R. 1 Rol. 507. l. 55.*

Or, *de anno in annum*, excepting one day in every year. *R. 1 Rol. 508. l. 2. 1 Bul. 215. 2 Cro. 308.*

So, if a copyholder makes three leases together each for one year only, and each to commence 27 *M.* after the end of the former; it is not good, for it is only a shift to evade the custom. *R. 1 Rol. 508. l. 10. Cro. Car. 233. Jon. 249.*

So, if a copyholder covenants and agrees to make a lease for seven years, and so from seven years to seven years, for forty-nine years; for this amounts to a present lease. *2 Mod. 81.*

So, a copyholder having licence to lease, ought to pursue his licence; otherwise his lease is void. *R. Cro. El. 395.*

As, if he has a licence to lease for two years, and he leases for three years. *Semb. Ow. 73.*

If he has a licence to lease for twenty-one years from *Mich.* last, and he leases for twenty-one years from 25 *Dec.* next. *R. Cro. El. 395.*

If a copyholder in fee has a licence to lease for years, if he so long live, and he leases for years absolutely. *Semb. Cro. El. (462.)*

So, a copyholder having licence to make a lease for twenty-one years, cannot make two leases for that term; for he has satisfied his licence by one lease. *R. Mo. 184.*

But a custom, that a lessee for life shall make a lease for the life of another, is void. *R. Mo. 8.*

So, a lease by an infant of a copyhold shall be voidable. *Jon. 157.*

What lord may grant a licence. *Vide ante, (C 3.)*

When a lease without licence, not warranted by the custom, or not pursuant to the licence, is a forfeiture. *Vide post. (M 2.)*

But if a copyholder makes a lease by licence, the lessee may assign without licence. *1 Rol. 508. l. 28.*

Or make an under-lease; for the lord by his licence has parted with his interest. *R. 1 Rol. 508. l. 28.*

So, if the lessor after a lease by licence, dies without heir, the lessee shall have it for his term against the lord; for the licence is a confirmation of the lord. *R. Hut. 101, 2.*

So, a lease without licence is good, between lessor and lessee. *R. Ow. 18. Lat. 199.*

And if a copyhold be to *A.* for life, remainder to *B.* in fee, and *B.* makes a lease for years by *parol*, and then *A.* and *B.* join in a surrender to the use of *B.* the lease commences presently. *R. Cro. El. 160.*

If the lord licence his copyholder to make a lease of lands in the tenure of *A.* tho' they are in the tenure of *B.* yet the licence is good. *R. 2 Rol. 52. l. 20.*

If the lord licence his copyholder for life to make a lease for three years, if he so long live; a lease for three years absolutely, is good: for a lease by a copyholder for life determines by his death, and therefore the condition annexed, being implied by law, is void. *R. Ow. 73. Cro. El. (462.) Semb. 2 Cro. 437. Poph. 105.*

So, if he makes a lease for fewer years than his licence allows. *R. 2 Cro. 437. R. Cro. El. 535.*

If the lord license upon condition, the condition is void; for he grants nothing, but only dispenses with the forfeiture. *Per two J. Cro. El. (462.) Poph. 106.*

But a licence may be upon a condition precedent; for till the condition is performed, it is no licence. *Poph. 106.*

A lease from the husband by licence, shall not be avoided by the wife, who claims dower by custom; for the lessee is in under the custom. *R. 2 Cro. 36.*

So, if a copyholder, after a lease by licence, forfeits his copyhold; the lord shall not avoid the lease. *Semb. Hob. 177.*

Or, dies without an heir. *R. Hut. 101. Vide supra.*

If a copyholder by licence makes a lease for years, rendring rent, he cannot afterwards surrender the rent without a surrender of the reversion. *1 Leo. 315.*

And if he grants the rent, and the lessee attorns, the grantee shall not have debt for it; for he is not privy, nor has the reversion. *Semb. 1 Leo. 315.*

But the grant is good as a rent-seck. *Per Gawdy, 1 Leo. 315.*

A lease without licence, not warranted by the custom, is a forfeiture. *Vide post. (M 2.)*

But makes no disseisin to the lord. *Latch, 199.*

(K 4.) Copyhold shall descend contrary to the Rules of the Common Law.

So, by custom, a copyhold shall descend contrary to the rules of the common law; as, by the custom of *Burrough-Englsh* to the youngest son. *Kit. 102. a.*

Or, to the youngest brother. *Ibid.*

Or, to the youngest daughter. *Ibid.*

To the youngest son or daughter of the first wife, she being espoused when a virgin. *Kit. 102. a. 1 Ver. 489.*

So,

So, to the eldest daughter only. [*Vide 1 Term Rep. 466.*]

To the eldest daughter for life, and after her death to the next heir male of the father, who derives his descent by males. *R. 1 Sid. 367. 1 Lev. 172. 293.*

And if, by custom, the wife has free-bench and during her estate the eldest dies, the next daughter, being eldest at the death of her mother, shall have it. *R. 1 Sid. 267. 1 Lev. 172.*

So, by custom, a copyhold may descend to all the males; as, in gavelkind, at *Islington*. *Kit. 102. a.*

Or, to all the brothers. *Ibid.*

Or, to all the sons, if the copyhold contains above five acres; otherwise to the youngest only. *Ibid.*

So, by custom, if a man purchase *Bookland*, and *Bondland simul & semel*; it descends to the eldest son. *1 Leo. 56.*

So, if he purchase *Bookland* first, and then *Bondland*, both descend to the eldest: but if he purchase *Bondland* first, both descend to the youngest son. *Ibid.*

So, by special custom, a copyholder for life shall name his successor, *R. 1 Rol. 562. l. 5. R. 4 Leo. 238. 1 Brow. 132.* Otherwise, the lord shall have it. *1 Sid. 267.*

So, by custom, after the death of a copyholder for life, the lord ought to admit his eldest son for life, and if he has no son, his daughter. *Adm. Mo. 788.*

[A single admittance at a court leet and court baron, is evidence to prove the custom for lands to descend to the youngest nephew, tho' there is a presentment that the custom extends only to the youngest son, and youngest brother, and no farther. *Doe v. Mason, P. 10 G. 3. 3 Wilf. 63.*]

[A customary of a manor, appearing to be of great antiquity, and delivered down with the court rolls from steward to steward, tho' not signed by any person, is good evidence to prove the course of descent within the manor. *1 Term Rep. 466.*]

(K 5.) The Lord shall appoint a Guardian.

So, by special custom, the lord shall name guardian to the heir of his copyholder, who is within age, the next of blood, to whom the copyhold cannot descend. *Kit. 103. a. Vide ante (E).*

Or, shall give the custody to his bailiff, who shall render an account to the heir at his age of fourteen years. *Kit. 103. a. Dy. 302. b. in marg.*

Or, otherwise shall dispose of it according to the custom of the manor. *3 Lev. 395.*

As, by custom, the lord may assign a copyhold to any one, during the infancy of the tenant, without account. *Semb. 1 Leo. 266.*

So, by custom, the heir at the age of fourteen years may chuse a guardian for himself. *Kit. 103. a.*

But a copyholder cannot dispose of the custody, by his testament within *stat. 12 Car. 2. 24. R. 3 Lev. 395.* If there be a special custom, that the lord shall assign a guardian to his infant copyholder. *R. in the same Case, Lut. 1190.*

If the lord, by custom, appoints a guardian to his copyholder, such guardian shall have debt, &c. in his own name, for rent upon lease of the copyhold. *Dy. 302. b. in marg.*

And shall have *ejectione custodie*. *R. Cro. El. 224. 1 Leo. 328. Vide post. (P 3.)*

So, if a copyholder be a lunatic, the lord, by special custom, may appoint a guardian, or committee of his customary lands. *Adm. Hob. 215. Hut. 16.*

So, if a copyholder be an idiot; for the king shall not have the custody of his copyholds, tho' *ff. prerog. regis* gives to the king the custody of all his lands. *4 Co. 126. Hard. 434. R. Dy. 302. b.*

Or, *furdus & mutus*. *R. 2 Cro. 105.*

And the committee shall hold against the *prochein amy* of the copyholder. *Ibid.*

But such committee shall not sue in his own name, but in the name of the lunatic. *R. Hut. 16. Hob. 215.*

(K 6.) Copyholder shall have Common,

So, by special custom, a copyholder shall have common within the waste of the lord. *4 Co. 32. a. Feifson.*

Or, in *alieno solo*. *4 Co. 32. a.*

So, by custom, he may have sole pasture in the waste of the lord. *R. 2 Sand. 327. Pol. 16. Dub. Vau. 255.*

And may claim sole pasturage for his cattle tho' not *levant* and *couchant*. *R. Pol. 20. 2 Sand. 327.*

But he can have common only for his cattle *levant* and *couchant*. *Adm. 2 Sand. 327.*

So, he may license a stranger to put his cattle into sole pasture. *R. 2 Sand. 327. Pol. 23.*

But not into common. *Adm. 2 Sand. 327.*

So, a single copyholder may allege a custom to have common within the waste of the lord. *R. 4 Co. 32. a.*

So, by special custom, a copyholder may have estovers, or other profit within the waste, or woods of the lord. *4 Co. 32. d.*

[A copyholder in fenny lands may be entitled to dig the lord's soil for turf. *Dean of Ely v. Warren, T. 1741. 2 Atkyns, 189.*]

[Common of turbary cannot belong to an occupant. *Ibid.*]

And tho' the lord sells his waste, and afterwards grants a copyhold the copyholder shall have common. *1 Brow. 231. Vide post. (K 7.)*

But if the lord enfeoff his copyholder, who has common by custom, whereby the copyhold is destroyed, he shall not have common; for it is gone. *R. 1 Sal. 170.*

So, if he confirm the estate of the copyholder *cum pertinentiis*. *R. 2 Cro. 253. 1 Bul. 2. Yel. 189. 1 Brow. 209.*

So, if the lord by deed grants the freehold of a copyhold, to which estovers belong, to his copyholder, with all lands and hereditaments appurtenant, or used with it; the estovers are destroyed. *R. 2 Cro. 253. Mo. 667. 2 Bro. 211.*

So, if the lord grants the freehold of a copyhold, to which common belongs, with all profits and common appurtenant; the grantee shall not have common, for it was appurtenant to the customary estate, not to the freehold. *R. 2 Rol. 61. l. 5. D. cont. 1 Bul. 2.*

Tho' the grant was only for years. *R. 2 Rol. 61. l. 10.*

Yet, if a copyhold to which common belongs escheats, and the lord, by deed, grants it with all common appurtenant, or used with it;

it; the grantee shall have common, for it amounts to a new grant, tho' the antient common was extinct. *R. Cro. El.* 794. *2 And.* 169.

So, if a copyholder has common out of the manor, and be enfranchised, his common remains, for it belongs to the land. *1 Sal.* 170.

(K 7.) Shall take Trees.

So, by special custom, a copyholder in fee may cut down trees, and sell them at his will. *R. 1 Rol.* 560. *l.* 25. *Cro. Car.* 221. *Dal.* 8. *Noy.* 2.

So, a copyholder for life, who by custom names his successor; for he has *quasi* an inheritance. *R. 1 Rol.* 560. *l.* 35. *1 Brow.* 132. *2 Brow.* 87. *Noy.* 2.

[Where a copyhold is granted for three lives to a man and his heirs, and he has no power of compelling the lord to renew on the falling in of the lives, he cannot cut timber growing on the estate. *2 Term Rep.* 746.]

And one single copyholder may prescribe to have power to cut trees *R. Cro. El.* 353. *4 Co.* 32.

But a copyholder for life merely cannot cut down and sell; for such custom, that a copyholder, who has not any interest but for life, may cut down trees at his will, is void. *R. 1 Rol.* 560. *l.* 30. *Adm.* 3 *Bul.* 81. *R. 2 Cro.* 29. *R. Cro. Car.* 221. *R. 1 Bul.* 158. *2 Brow.* 85. *Noy.* 2. *Jon.* 245.

Or, that every copyholder may cut. *Win.* 1.

So, a custom, that a copyholder may pull down houses, is void. *D. 1 Bul.* 51.

So, by special custom, a copyholder shall take housebote, hedgebote, cartbote, &c. *R. Cro. El.* 5. *Adm. Mo.* 812.

So, it seems without a special custom. *Per Holt, Sal.* 638.

And if the lord cut down trees, where by custom the copyholder shall have the lops; an action upon the case lies against the lord. *R. 1 Rol.* 196. *1 Brow.* 231. *1 Rol.* 108. *l.* 10.

Or trespass. *Per cur. inter Ashmede and Ranger, R. 12 W.* 3. (*Com.* 71. *Sal.* 638. *Ld. Ray.* 551. *But reversed in Parl. Sal.* 638. *Ld. Ray.* 551.) *R. 1 Leo.* 272.

So, if the lord bargains and sells his trees, and the bargainee cuts them down, an action upon the case lies against the bargainee. *R. 1 Brow.* 231.

So, if the lord demises the manor for years, except the trees, and the lessee grants a copyhold; the copyholder shall have the lops of the trees, for they are parcel of the manor. *R. 1 Brow.* 231.

Otherwise, if the lease was for life; for then they are severed from the manor. *Ibid.*

So, if a copyholder for life does waste, and cuts down trees, &c. he in remainder shall have an action upon the case. *Dub.* 3 *Lev.* 131.

So, if a stranger cuts down trees upon a copyhold, the copyholder shall have an action upon the case for the loss of shade, fruit, &c. tho' it was not the custom for him to take the trees. *3 Lev.* 131.

So, the lord also, for the prejudice to his inheritance. *3 Lev.* 131. *Vide action upon the case for Misfeasance, (A 2.)*

So, the lord may have trespass. *2 Rol.* 551. *l.* 50.

So, a copyholder shall have trespass *quare clausum fregit & succidit.* *2 H.* 4. 12. *4 Co.* 21. *b.*

So, where there is not a special custom for the copyholder to cut, the lord may cut, and the copyholder has no remedy against him; tho' he be copyholder for life, and pleads that he has not sufficient for repairs. *R. cont. in B. R. and Exch. but reversed in Parl. Sal. 638. (Ld. Ray. 551.)*

So, the lord may grant all the wood.

And if he grants to a copyholder, the benefit does not merge in his copyhold. *1 Ver. 22.*

(K 8.) Shall render his Services.

A copyholder ought to do his services to the lord. *42 Ed. 3. 25. b.*
When a denial of services is a forfeiture. *Vide post. (M 4.)*

(K 9.) *Fealty.*] Tenant by copy shall do fealty. *Co. L. 63.*

When a freeman does fealty he shall put his right hand upon the book, and shall say, *I shall be faithful and true unto you, and faith to you shall bear for the lands which I claim to hold of you, and I shall lawfully do to you the customs and services, which I ought to do at the terms assigned; so help me God:* then he shall kiss the book. *By the st. 17 Ed. 2. Lit. S. 91.*

But a villein shall say, *I from this day forward shall be to you true and faithful, and shall owe you fealty for the lands that I hold of you in villenage, and shall be justified by you in body and goods. So help me God. By the st. 17 Ed. 2. Rast. Co. L. 68. a.*

Tenant by copy shall do fealty in person; for he cannot swear by attorney. *9 Co. 76, Co. L. 68. a.*

But the steward may take fealty for his lord. *Lit. S. 92.*

Or, the bailiff. *Ibid.*

(K 10.) *Rent.*] A copyholder shall render rent,

And if the copyhold comes to the lord by escheat, &c. he may make a grant of it, rendring a greater rent, *Per Lea, 2 Rol. 236.*

But if a man by deed demises a copyhold and free-land, rendring rent; the whole rent shall issue out of the free-land, for the lease without licence is void as to the copyhold. *Per Dy. Mo. 50.*

So, if a copyholder surrenders, rendring rent; the reservation of rent is void. *Dy. Mo. 352.*

And if the lord, upon a surrender makes an admittance, rendring a greater rent, the reservation is void. *2 Rol. 236.*

(K 11.) *Relief.*] So, by custom, a copyholder shall be bound to pay a relief to his lord, either by tenure or reservation. *Jen. 133. [Vide st. 12 Car. 2. c. 24. s. 5, 6, 7.]*

And, by custom, it may be but *1 d.* tho' the rent be *10 s.* *Kit. 103. a.*

Or, a moiety of the rent upon a descent, and as much upon a purchase. *Kit. 103. a.*

So, by custom, a relief may be due upon alienation. *Latch, 95.*

And a devise shall be an alienation. *R. Latch, 95.*

So, every freeholder, who has land by descent within a manor, being of full age, shall pay a relief. *Lit. S. 112.*

Or, being of any age, if he does not hold by chivalry. *Kit. 146. Co. L. 91.*

So, if he dies, his heir being within age, and in ward to the king for

for all his land, at full age he shall pay a relief to the other lord. *2 Cro. 28.*

So, if the eldest son dies before entry, whereby the youngest enters, he shall pay two reliefs. *Kit. 146.*

If a tenant enfeoffs his heir, and dies before the lord accepts him, the heir shall pay a relief. *Ibid.*

If the heir after his ancestor's death enfeoffs *B.* of whom the lord accepts rent; yet he shall pay a relief. *R. Cro. El. 885.*

But if he dies, his heir being within age, and the lord refuses the ward, he shall not have relief. *Semb. 2 Cro. 28.*

So, if one parcener dies, his heir being of full age, no relief shall be paid; for all the parceners are but one tenant to the lord, and a relief cannot be apportioned. *R. 3 Leo. 13.*

So, if upon a grant in fee farm no rent be reserved, or the full value; no relief shall be paid. *Mo. 168.*

So, he who is in by purchase shall pay no relief. *Kit. 146.*

So, an heir, by descent, of a reversion after an estate for life, shall not pay a relief, till the reversion falls in. *Kit. 146. b.*

So, a tenant by fee-farm shall pay no relief. *Ibid.*

So, none shall pay, except the true tenant in fee. *Keil. 82. a.*

The lord shall distrain for a relief, and shall not have debt for it. *Co. L. 83.*

But his executor or administrator shall have debt, and shall not distrain. *Co. L. 83. b.*

(K 12.) *What remedy for rent.*] If a copyholder refuses payment of his rent due, upon a personal demand, it is a forfeiture. *Vide post. (M 4.)*

So, if a copyholder surrenders the reversion after a lease to *A.*, who is admitted; the assignee shall have covenant against the lessee for non-payment of the rent, *within ft. 32 H. 8. 34. R. cont. 2 Cro. 305. Yel. 223. Per Hob. 178. Dub. Cro. Car. 25. D. cont. Cro. Car. 44. R. acc. 3 Lev. 327. Vide post. (N). R. acc. 1 Sal. 185. Sho. 285. Skin. 305.*

So, he shall enter for a condition broken within the same *ft. 32 H. 8. 34. Semb. 3 Lev. 327.*

So, the reversioner may distrain for rent, without attornment or notice. *R. Ray. 18. R. Pol. 142. 1 Lev. 40.*

So, if *A.* makes a lease of a farm, part copyhold and part freehold, rendering rent, and afterwards assigns the reversion by grant and surrender to *B.*, the rent issues out of both, and *B.* shall have debt against the lessee or his assignee. *R. Cro. El. 606. 622.*

(K 13.) *Suit of court. By a copyholder.*] So, a copyholder shall do suit at the court of his lord.

And he ought to do it in person, and not by attorney; for he is not within the *stat. of Merton*, 20 H. 3. 10. 2 *Inst. 100. R. 1, Leo. 104.*

So, he cannot do personal services by attorney. *1 Leo. 104.*

But a copyholder may compound with the lord *pro secta relaxanda. Kit. 74.*

(K 14.) *By a freeholder.*] So, a freeman may do suit at the lord's court. But

But by *stat. Marl.* 52 *H.* 3. 9. a freeman shall not be distrained to do suit, if he is not bound to do it by his feoffment or prescription.

And by the same stat. if land, which ought to do suit, descends to parceners, she who has the part of the eldest, shall do suit for all, and the others shall make contribution.

So, by the same stat. joint-tenants or tenants in common shall do but one suit for all the land. 2 *Inst.* 119. 6 *Co.* 1. b.

So, a feoffee of the eldest's part shall do suit for all the parceners. 2 *Inst.* 119. 6 *Co.* 1. b.

So, tenant by the curtesy. 2 *Inst.* 119.

And a woman may be a suitor at a court baron. *Ibid.*

But where the free-suitors are judges, a woman shall not be judge there. *Ibid.*

But none shall do suit, when he is in ward of the king, or his committee. *F. N. B.* 158. A.

Nor, tenant in dower, of lands in ward of the king. *F. N. B.* 158. B.

Nor, the lessee of the king, of lands escheated or forfeited. *F. N. B.* 159. A.

So, tenant in dower, of any land, shall not do suit; if the heir has sufficient to be distrained for it in the same county. *Ibid.*

So, if the lord purchases part of the land, the whole suit is gone; for he cannot have nor make contribution. 2 *Inst.* 120.

So, if parcel descends to the lord. *Ibid.* *Semb.*

Yet if a tenant enfeoffs another of parcel, every one shall do suit; for the service being intire shall be multiplied. *Vide* 2 *Inst.* 119, 6 *Co.* 1. b.

So, if land descends to parceners, where the king is lord, all shall do suit; for they are not within the *stat. of Marl.* *F. N. B.* 159. C.

And this after partition, or before. *F. N. B.* 159. C.

(K 15.) *By Attorney.*] By the *stat. of Merton*, 20 *H.* 3. 10. every freeholder may do suit by attorney at the hundred, court baron, &c.

But he ought to make an attorney under his seal. 2 *Inst.* 100.

And if the steward does not allow his attorney; he shall have a writ *de attornato allocando*. 2 *Inst.* 100.

And upon that an *alias*, *pluries*, and attachment, if the refusal be continued. *Kit.* 74. a.

Such attorney shall do the same suit as the freeholder ought. 2 *Inst.* 100.

But he cannot be a judge as the freeholder is; for no act can be done in a judicial capacity, by attorney. 2 *Inst.* 100.—*Cont. per Holt*; for the stat. makes no difference, *inter Hunt and Bourn*, *H.* 1 *Ann.* 1 *Sal.* 341. And therefore, a fine in *antient demesne* before an attorney of the suitors is good. *R. int. Hunt and Bourn*, *H.* 2 *Ann.* 1 *Sal.* 340, 1.

(K 16.) *Suit real.*] Every one of the age of twelve years ought to do service, at the tourn or leet, and take an oath to be loyal, &c. *Co. L.* 68. b.

Clerks, and women were not exempted by the common law. 2 *Inst.* 121.

And

And every person is resiant within some leet.

And a person not resiant may be bound to do suit at the leet. *Sal.*

604.

But by the common law, persons having cure of souls were exempted. 2 *Inst.* 121. *F. N. B.* 160. *C.*

And by the *st. Marl.* 52 *H.* 3. 10. *archiepiscopi, episcopi, abbates, priores, comites, barones, viri religiosi, & mulieres.*

And by the equity of this statute, all ecclesiastical persons, secular or regular. 2 *Inst.* 121.

So, tenant in *antient demesne* shall not be distrained to do suit at the leet, or sheriff's tourn. *F. N. B.* 161. *C.*

This suit shall not be done by attorney; for it is not within the *st. of Merton*, 20 *H.* 3. 10. 2 *Inst.* 99.

But by the *st. of Marl.* 52 *H.* 3. 10. a man having land in two leets, shall do suit only where he is conversant.

If his house be within two leets, he shall do suit where his bed is. 2 *Inst.* 122.

If his family is within two leets, he shall appear where he is comorant. *Ibid.*

And the servant shall be said to be resiant, where the master is. *Kit.* 33. *b.*

(K 17.) *Remedy for suit.*] For suit-service the lord may distrain, 2 *Inst.* 118.

For suit by parceners before partition, the lord may distrain any of them to do suit. *F. N. B.* 159. *E.*

So, after partition; but then the others shall have a writ against the eldest parcener to do suit, and she shall have a writ *de contributione facienda* against those who refuse contribution. 2 *Inst.* 119.

But a writ *de contributione facienda* does not lie before partition; for it is not within the *st. of Marl.* 9. 2 *Inst.* 119.

Nor in the case of the king does it lie, before, or after partition; for the *st. Marl.* 9. does not extend to the king's courts. *Ibid.*

So, for suit of joint-tenants, the lord may distrain each. *Ibid.*

But if one does suit, he shall not have a writ *de contributione facienda* against the others; because the possession is intire. *Ibid.*

So, for suit by tenants in common, the lord may distrain either, and he shall have a writ *de contributione facienda*. 2 *Inst.* 119.

By *st. Marl.* 52 *H.* 3. 2. the lord shall not distrain for suit-service out of his fee. 2 *Inst.* 104.

And for suit real, the lord shall not distrain, but there shall be an amerciamment. 2 *Inst.* 118.

And for suit of court the lord shall not have a writ *ad sectam in curiâ suâ faciendam*; because he may distrain. *Qu. F. N. B.* 158. *D.*

If the lord distrains for suit-service, when it is not within a charter of feoffment, by *st. Marl.* 9. the tenant shall have a writ *contra formam feoffamenti*. *F. N. B.* 163.

Which lies only for the feoffee and his heirs, against the feoffor and his heirs. *F. N. B.* 163. *C.*

If the lord distrains parceners, joint-tenants, &c. contrary to the *st. Marl.* 9. the tenant shall have a writ upon the statute *de exoneracione sect.* *F. N. B.* 159.

So, if he distrains a ward of the king, or any one who ought not to do suit. *F. N. B.* 158.

So,

So, if the lord distrains persons to come to his leet, who are exempted by the *ss. Marl.* 10. they shall have a writ upon this statute for their discharge. *F. N. B.* 160. 2 *Inst.* 121.

So, if he distrains any, who are exempt from suit to the leet, by the common law, they shall have a writ, that he do not distrain them. *F. N. B.* 161. C.

But for suit of court, the tenant shall not have a writ of attachment, but only after a writ that the lord shall not distrain him, if he be distrained when he ought not by the common law; tho' if he be distrained when he ought not by any statute, he shall have an attachment at first. *F. N. B.* 160. B.

(K 18.) *Heriot. What it is.*] Heriot is the best beast, or other thing, due to the lord upon the death or alienation of his tenant.

But the lord shall have that which he chooseth for the best, tho' it be the worst. *Hob.* 60.

(K 19.) *Heriot-service. When due.*] Heriot may be due by tenure, which is heriot-service, or by custom.

Heriot-service is due only upon the death of a tenant in fee. *D.* 21 *H.* 7. 13. a.

Yet it may be reserved upon a lease for life, after the death of tenant for life. *R. Lut.* 1367.

So, if a lease be to *A.* for life, afterwards to *B.* for life, remainder to *C.* for life, an heriot may be reserved after the death of each of them. 2 *Sand.* 167.

So, if a lease be for years, if two lives continue, it may be reserved after the death of each life. 2 *Sand.* 165. *R. Lut.* 1367. *Winch.* 47. 57.

If tenant by heriot-service aliens parcel, the heriot shall be multiplied. *Fitz. Heriot.* 1.

And if the lord be seised of a heriot by the alienee; it continues, though the tenant re-purchase this parcel. *Ibid.*

But a heriot is not due, if the tenant at his death had no beasts. *Semb. Hob.* 176. *Hut.* 4. *Dy.* 199.

Nor is it due of the goods of *cestuy que trust*, but of him who has the legal estate. 1 *Ver.* 441.

Heriot-service is of the nature of a rent. 2 *Sand.* 166.

And therefore shall go with the reversion to the heir. *Ibid.*

Or, to the grantee of the reversion. *Ibid.*

So, if there be a lease for lives, rendering rent, and an heriot upon every death, and afterwards the manor is leased for years; the heriot goes with the reversion to the lessee. *R. Win.* 47. 57.

So, if a lease be for 99 years, if two lives so long continue, to commence after a death, surrender, &c. of a former lease, reserving an heriot after the death of each life; if either dies before the lease commences, no heriot shall be paid. *R. per three J. Keeling cont.* 2 *Sand.* 166. 1 *Sid.* 437. 1 *Vent.* 91. 1 *Lev.* 294. 2 *Keb.* 677.

So, for the last life no heriot can be seised, or levied by distress, but only by action upon the contract; for by his death the term is determined. *Dub. Lut.* 1368.

(K 20.) *How recovered. By seizure.*] Heriot-service may be seized. *Cont. per Frowick, Kzl.* 82. a. 84. b. *R. acc. Pl. Com.* 96. *R. acc. Ma.*

Mo. 540. Cro. El. 590. R. cont. Bend. pl. 47. R. cont. 1 And. 299. Acc. Bro. Heriot, 2. [Edwards v. Stanley, C. P. H. 13 Geo. 2. Willes, 192.]

So, an heriot due by reservation; for that is an heriot-service. *Dub. Lut. 1367, 8.*

[If an heriot be reserved by deed since the *stat. Quia Emptores*, payable by tenant in fee, it will be considered as rent, and then the landlord cannot seize, but must either distrain, or bring an action for non-payment. *Edwards v. Stanley, C. P. H. 13 Geo. 2. Willes, 192.*]

And the seizure may be out of his fee. *6 Ed. 3. 36. a. R. Lut. 1367. Bend. pl. 47. Fitz. Heriot, 5. R. 1 Sal. 356.*

And, by a stranger to the use of the lord. *Per Keble, 2 H. 7. 15. b.* So, if the heriot be eloiigned, the beast of another, remaining within his fee, may be distrained or seized. *Per Chard, 27 Ass. 24.—Per cur. Kel. 167. a.—It may be distrained, but not seized. Cro. Car. 260.*

So, if an heriot be sold, it may be seized in the hands of the vendee, unless the sale was in *market overt*. *Kit. 134. b.*

But, generally, the beast of another may not be seized for an heriot. *1 Ed. 3. 6. a. D. Cro. Car. 260.*

So, if upon a lease for three lives there be reserved for an heriot upon the death of each, *his or their best beast*, and the lease be assigned, and then one of the lives dies; the beast of the assignee cannot be taken. *R. 2 Rol. 451. l. 30. Lut. 1368.*

So, upon a reservation of an heriot, the beast of another upon the land cannot be distrained. *Dub. 3 Mod. 231. Lut. 1368.*

(K 21.) *By distress.*] So, for heriot-service a man may distrain, for it is a service annexed to the land. *Per two J. 8 H. 7. 10. b. Pl. Com. 96. a. Cro. Car. 260. Bro. Heriot, 2.*

And may distrain the cattle of another continuing upon the land. *Cro. Car. 260. Bro. Heriot, 6. Vide ante, (K 20.)*

In avowry for heriot-service, he ought to prescribe, that he and all those whose estate, &c. ought to have an heriot upon the death of every tenant. *21 H. 7. 13. a. 15. a.*

And he ought to shew, what land he holds in particular. *21 H. 7. 16. a.*

And allege seisin in himself, or in his ancestor. *6 Ed. 3. 36. a. Per three J. 14 H. 4. 5. a.*

And shew, whether the heriot be a beast or other thing. *R. Hob. 176. Hut. 4.*

It is sufficient if it be alleged, that he died his tenant, without saying, that he died seised. *Per cur. 44 Ed. 3. 13. a.*

And in avowry for an heriot, he need not shew for what beast, or of what value. *R. Cro. Car. 260. Jon. 300.*

And if he avow for several heriots, it is sufficient to say, that he took them *nomine heriotor*. generally. *R. 1 Bul. 102.*

But an avowry, that every tenant at his death hath used to pay an heriot, is repugnant and bad. *21 H. 7. 13. a. 15. a.*

So, an avowry without alleging seisin of the services, whether it be rent-service, or not, or upon the death of what tenant it is due, is bad. *Bend. pl. 119.*

So, for an heriot upon reservation of the best beast, or *5 l.* at election, the lessor, or at least his bailiff, cannot distrain for the best beast, till a demand, or election made. *D. Lit. 35.*

So,

So, a distress for an heriot cannot be out of the manor. 1 *Sal.* 356.

The property of an heriot-service is not vested in the lord till distress, or seizure. 8 *H.* 7. 10. *b.* *Semb.* that it was vested before, otherwise he could not seize. *Pl. Com.* 96. *a.*

Seizure of an heriot-service, due by ancient tenure, may be out of the manor. *Per Holt, Sho.* 81.

Otherwise, of an heriot reserved by deed. *Sho.* 81. *R. cont. Lut.* 1367.

Heriot-service shall be extinct by unity of possession. 14 *H.* 4. 5. *a.* *Bro. Heriot,* 8.

So, if the lord purchases parcel of the land. *Co. L.* 149. *b.* *R.* 8 *Co.* 105. 2 *Brownl.* 294.

So, if a tenant makes a settlement upon his son in marriage, it avoids the heriot, and is not fraudulent within *st.* 13 *El.* 5. *R.* 2 *Brownl.* 187.

But by *st.* 13 *El.* 5. a feoffment, &c. or conveyance of lands, &c. of an intent to defraud, &c. of heriots, &c. as to the persons so defrauded shall be void; and the person, party to such conveyance, &c. who shall wilfully put in ure, &c. the same, shall forfeit a year's value of such lands, and the whole value of such goods, &c.

And upon this an action lies for the lord *qui tamen*, &c. for all goods aliened to defeat him of his heriot, tho' other lords are also defeated; and the plaintiff shall recover only the value of his heriot. *Semb.* *Dy.* 351. *b.*

So, if tenant by heriot-service enfeoffs *A.* of part; the service, being intire, shall be multiplied, and not extinct. *R.* 8 *Co.* 106.

And if the lord afterwards purchases the part of the feoffor, the heriot-service due from *A.* is not extinct. *R.* 8 *Co.* 106. *a.*

(K 22.) *By action.*] So, for an heriot reserved upon a lease, debt lies. 2 *Sand.* 167. *Vide post.* (K 26.)

Or, covenant. 2 *Sand.* 165. 7.

(K 23.) *Heriot-custom. When due*] So, an heriot may be due by the custom of a manor, upon the death of every tenant of an estate of inheritance.

If he dies, his tenant, tho' he does not die seised. *Kit.* 134. *a.* *Bro. Heriot,* 1.

So, upon the determination of an estate for life, tho' the estate has not continuance afterwards. 21 *H.* 7. 15. *b.* *Kel.* 80. *Kit.* 133. *Bro. Heriot,* 5.

Or, upon the determination of an estate for years. *Kel.* 80. 21 *H.* 7. 15.

Or, at will. 2 *Bul.* 196.

So, by custom, it may be due upon the surrender, or alienation of the tenant. *Adm.* 3 *H.* 6. 45. *b.* *Kit.* 134. *b.*

So, by custom, it may be due upon death of the head of a body politic. *D. Long.* 5 *Ed.* 4. 72. *b.*

So, it may be upon the death of some tenants, tho' not upon the deaths of others within the same manor. *Kit.* 134. *b.*

So, if a man dies tenant of several heriotable tenements, he shall pay several heriots. *Kit.* 134. *a.*

And

And if a tenant enfeoffs several parts of heriotable lands, each shall pay an heriot; for they shall be multiplied. 6 Co. 1. a.

If land escheats, &c. and afterwards is re-granted, yet an heriot shall be due upon death; for heriot-custom is not extinct by unity of possession. 14 H. 4. 5. a. Per Hussy, 8 H. 7. 11. a. But the reporter makes a quare. Per two J. acc. 2 Brownl. 295, 6.

If a tenant surrenders to another, and dies before the surrender is presented; an heriot shall be due. Kit. 135. a.

So, if a copyholder be disseised, and dies before re-entry; for he is tenant in right. Per Berkly, 2 Rol. 72. l. 35.

So, if a tenant enfeoffs the lord of part of heriotable land; the heriot-custom shall not be extinct. 8 Co. 106. b. 2 Brownl. 295, 6.

And an heriot shall be paid before a mortuary. Co. L. 185. b.

And, tho' a testator devises all his goods. Ibid.

So, by custom, so much money may be due, loco heriotti, and not a beast. Kit. 103. a.

[It seems that a custom for the homage to assess a compensation in lieu of a heriot, to be paid by an in-coming copyholder on surrender or alienation, is not good. Parkin v. Radcliffe, C. P. T. 38 Geo. 3. 1 Bos. & Pull. Rep. 282.]

[If the lord set up a custom to have the best live or dead chattel as a heriot, quare, If the tenant can modify that custom by pleading another, that the homage shall assess a compensation in lieu of the heriot? Ibid.]

Or, the best chattel.

(K 24.) When not.] But if an heriot be due upon the death of every tenant, and the land be granted to joint-tenants, no heriots shall be paid upon the death of one, till the deaths of all the joint-tenants, without a special custom; for all are but one tenant. 24 Ed. 3. 72. b. Tr. 25 Ed. 3. pl. 3. Bro. Heriot, 4. Fitz. Heriot, 3. 5.

So, if a feme-covert dies tenant of heriotable land, no heriot shall be paid; for she has no goods. [4 Leon. 239. Kelw. 84.]

So, where by custom a corporation pays an heriot upon the death of the head, if a prior has such land and dies, he shall not pay an heriot; for he has no goods. Kit. 134. a.

So, a custom to pay an heriot upon the death of every stranger, who dies within the manor, is not good. 4 Mod. 321. Dy. 71. b. in marg. R. Cro. El. 725.

[An heriot is not payable on the death of a tenant by the curtesy. Per Frowike Ch. J. Kelw. 84. b. 14 Vin. 296.]

(K 25.) How it shall be recovered. By seizure.] By the death of the tenant the property of an heriot-custom is vested in the lord immediately. Vide ante, (K 20.)

And therefore, the lord may seize an heriot-custom, but not distrain for it. Per two J. 8 H. 7. 10. b. 27 Aff. 24. Per cur. Kel. 167. Bl. Com. 96. a.

And he may seize in any place. Kel. 82. a. 84. b. Per Holt, Sho. 81. 1 Sal. 356.

But he cannot seize the beast of another. 3 H. 6. 45. b. Cro. Car. 260.

And a custom to take the beast of another upon the land, if the

heriot be eloigned, is void. *R. Dy. 199. b. 2 Brownl. 90. R. Mo. 16. Bend. pl. 147. 294.*

So, if the lord seizes the worst beast, for the best, he must be content with his election, and cannot afterwards seize another. *Bro. Heriot, 11. Hob. 60.*

(K 26.) *By action.*] So, if an heriot be eloigned that the lord cannot seize, he may have *detinue* against him who detains it; for the property was immediately in him. *Bro. Heriot, 6. 9. Vide ante, (K 22.)*

But he cannot distrain for an heriot-custom: for the property being in him, a prescription to distrain for his own goods, is not good. *Bro. Heriot, 2. 6, 7.*

So, he cannot prescribe, that every tenant ought to pay an heriot after his death, but, that after a death he ought to have, &c. *R. 21 H. 7. 13. a. 15.*

(K 27.) *To what lord it shall be paid.*] If the lord grants the freehold of his copyholds, or of a particular copyhold in fee, or for years; the heriot shall be paid (if the land be heriotable) to the grantee. *Vide ante, (B 2.)*

But if the grant be of the freehold to *A.* for the life of the copyholder, and afterwards to the copyholder himself for years, who assigns the term, and then dies; the heriot shall not be paid to the assignee, for he was not lord at the time when it happened. *R. 2 Rol. 72. l. 20.*

In *replevin*, or trespass, if defendant avows or justifies for heriot-service, he ought to allege seisin of the land, of whom the manor is held, and by what services. *8 Co. 103. Vide Pleader, (3 K 15.)*

So, for heriot-custom, he ought to allege seisin, custom, death, and seizure of the heriot. *Lut. 1310. Vide Pleader, (3 K 28.)*

And it is not sufficient to allege a custom to take the best beast, without saying, *pro herioto, vel, nomine heriotti.* *Dy. 199. b.*

So the seizure ought to be alleged, *pro herioto, vel, nomine heriotti.* *Dy. 199. b. Semb. cont. where the omission was shewn or cause of demurrer, yet the plea was held good. Win. Ent. 63.*

(L) Copyhold, how destroyed.

IF a copyholder takes a feoffment from the lord, of his customary land, the copyhold is destroyed. *4 Co. 31. French.*

So, if he takes a lease for life, or for years, the copyhold is destroyed for ever. *R. 4 Co. 31. French. Vide ante, (B 3.) Semb. Latch, 213.*

Though the lease was by *parol.* *4 Co. 31. 1 Rol. 498. l. 50.*

So, if the lord makes a lease of customary land, and the lessee assigns his term to the copyholder, the copyhold is destroyed for ever. *R. 2 Co. 17. a. 1 Rol. 510. l. 30. R. Mo. 185. 1 Leo. 170.*

So, if the lord lease a copyhold for half a year, or any time certain. *1 Rol. 498. l. 50. Vide ante, (B 3.)*

So, if he makes a feoffment, lease for life, &c. of a copyhold. *1 Ver. 458. Vide ante, (B 3.)*

Tho' he enters for a condition broken, the feoffment being upon condition. *R. 4 Co. 31.*

So,

So, if the king grants a lease of land demised by copy, and afterwards grants the reversion to another in fee, and the lessee assigns to the copyholder, the copyhold is destroyed. *R. 1 And. 191.*

So, if tenant in tail of a copyhold, remainder to him in fee, purchases the freehold, and then makes a bargain and sale to *A.* the issue in tail shall not avoid it. *R. 1 Ver. 393. [3 P. W. 9.]*

[So, also, it seems if the remainder in fee be in another, and the tenant in tail purchase the freehold and die without issue, the remainder-man shall not be entitled to the copyhold. *Semb. 3 P. W. 10. in the notes.*]

So, if a copyholder takes a lease of a manor, his copyhold is extinct; but it may afterwards be re-granted by copy. *Vide ante, (B 3.) R. 4 Co. 31. b. Cont. per Shute, Sav. 70.*

So, if a copyholder sues execution upon a statute, and has the manor in execution, his copyhold is gone. *Cont. per Manwood, who says, that after the debt levied, the customary interest remains. Sav. 70.*

So, if a copyholder by deed sells his copyhold to the lord, his estate is extinct; but may afterwards be re-granted by copy. *R. Hut. 65. Jon. 41.*

Though the lord was only lessee for years of the manor. *R. Hut. 65.*

So, if a copyholder by deed releases his copyhold to the lord, tho' it be not of the nature of a release to give possession. *Hut. 65. Jon. 41.*

But if the lord enfeoffs his copyholder, to the use of another, his copyhold is not destroyed; for it is saved by the *st. 27 H. 8. 10. R. 7 Co. 39. a. Lillingston.*

So, if the king grants a copyhold by patent for life, it shall not be extinct, but the king may afterwards grant it by copy. *R. 2 Rol. 197. l. 5. Vide ante, (B 3.)*

So, if the king afterwards grants the manor, the grantee, after the life ended, may grant it by copy. *R. 2 Rol. 197. l. 20.*

So, if the lord grants the freehold of a copyholder to *A.* for the life of the copyholder, his copyhold is not destroyed. *R. Hob. 181.*

So, if the lord makes a new grant by copy for life, with remainder over, &c. to his copyholder in fee; the inheritance of the copyhold is not thereby destroyed. *R. cont. 37 El. ut dicitur; but there per two J. acc. 3 Bul. 81.*

And if the lord makes a bargain and sale of the inheritance of a copyhold, to a copyholder for life, who accepts it; the remainder of the copyhold is not thereby destroyed. *R. 9 Co. 106, 7. M. Podger.*

So, if there be a copyhold for three lives *habend' successivis*, and the lord by deed grants the inheritance to the first, the interest of the second life is not destroyed. *Adm. 2 Leo. 72.*

So, if the inheritance be granted to the first life, remainder to the second life, who does not agree to the grant. *Semb. 2 Leo. 73.*

But if the first life be destroyed by grant of the inheritance, the second life in remainder cannot have the advantage till the death of the first. *R. 2 Leo. 73.*

(M) Copyhold, how forfeited.

(M 1.) By Treason, or Felony.

[THE severity of the law in cases of forfeiture warrants the courts in *Westminster-Hall* in taking care that there is the greatest accuracy in the lord's proceedings; and therefore, in all cases of forfeiture, which are *strictissimi juris*, if there be any irregularity, it is sufficient to overturn the whole proceedings. *Per Lord Kenyon Ch. J.* 3 *T. R.* 169. 173.]

If a copyholder commits high treason, his estate is forfeited to the lord, not to the king, except by the express words of an act of parliament. 2 *Vent.* 39. *Vide post.* (M 6.) *Per Hale, Hard.* 434.

And upon his attainder his estate is absolutely determined; for he cannot afterwards be of the homage. 2 *Jon.* 190.

Nor take a surrender out of court. *Ibid.*

So, if a copyholder commits felony, his estate is forfeited to the lord by custom. 2 *Jon.* 189. *Pol.* 621. *Skin.* 8.

And a custom, that if a copyholder commits felony upon presentment of the homage, the lord shall enter, is good. *R.* 1 *Bul.* 13. 1 *Leo.* 1. 2 *Brow.* 217.

Yet if the lord grants a copyhold to *A.* for life, and upon his death, or forfeiture to *B.*, and *A.* is attainted for felony, *B.* shall enter; for the lord shall not have it against his own grant. *R.* *Skin.* 29.

But for treason or felony, the lord cannot seize till attainder, without a special custom allowing seizure before. *Per cur.* 2 *Vent.* 38. *Semb.* 1 *Lev.* 263.

And if the felon be acquitted upon trial, the forfeiture shall be discharged, tho' the felony was presented by the homage. *R.* *Godb.* 267.

So, if the copyholder has clergy, the lord cannot seize without a special custom. *Semb.* 1 *Lev.* 263.

So, if the copyholder be acquitted upon an indictment. *Dub.* 1 *Bul.* 13. 2 *Brow.* 220. *R.* *Godb.* 267.

So, if the husband be attainted the wife does not forfeit her dower, which she has by custom in his copyhold. *R.* *Hard.* 434.

[A forfeiture by a copyholder's levying a fine may be waived by the lord. 3 *T. R.* 162.]

[A fine levied by a copyholder, who continues in possession, is void, as against the lord. *Ibid.*]

[No fine levied with proclamations shall bind any but those who are put out of possession, and have but a right; for if their estate or interest be not divested out of them, but remains in them as it was *ab initio*, they need not make an entry or claim to that which never was divested. 5 *Co.* 123. *Saffyn's case.* 9 *Co.* 106. *Margaret Podger's case.*]

(M 2.) By Alienation.

So, if a copyholder makes an alienation by deed, it is a forfeiture by the general law of copyholds. *Lit. S.* 74.

As, if he makes a feoffment.

If he makes a charter of feoffment, with a letter of attorney to make livery; though no livery be made. 1 *Rel.* 508. *l.* 21.

So, if he makes a bargain and sale in fee, tho' the deed be not inrolled;

rolled; for it is sufficient to determine a lease at will. 1 *Rol.* 508.
l. 17. but there said to be R. cont. 38 Eliz.

So, if he makes a lease for life.

Or, if he makes a lease for years, not allowed by the custom, without licence. *Co. L. 59. a.*

What leases a copyholder may make, *vide ante*, (K 3.)

So, if he makes a lease not pursuant to his licence. *Mo. 184. R. Cro. El. 395.*

If the forfeiture be by a lease without licence, the seizure may be after the lease is determined. *Per Powel, Lut. 803.*

But if he makes a charter of scossment, or deed of demise for life, without a letter of attorney to make livery, it is no forfeiture. 1 *Rol.* 508. *l. 25.* And so *Co. L. 59. a.* seems to be intended.

So, if he makes a release of his right to the copyholder in possession. *Co. L. 59. a. Vide ante*, (I 1.)

Or, if he promises to make a lease, but does not. *R. 1 Bul. 190.*

Or, makes a lease for a year, and covenants to make a lease afterwards *de anno in annum usq.* ten years. *R. 1 Bul. 190. 2 Cro. 301.*

So, if a copyholder for life surrenders to another in fee, it is not a forfeiture; for nothing passes by livery. 4 *Co. 23. a. Bullock. Mo. 753.*

Nor if he suffers a common recovery in the court of the manor, *R. 1 Mod. 200. 2 Mod. 33.*

Or, if an infant makes a lease without licence. *Noy, 92. Latch, 199.*

Otherwise, if he accepts the rent at full age; for his lease was not void, but voidable. *Noy, 92. Latch, 192. R. Jon. 157.*

(M 3.) By Waste.

So, if a copyholder commits waste, it is a forfeiture, by the general custom of copyholds. 1 *Rol.* 508. *l. 31. R. Mo. 392. R. Ow. 17.*

Or, if he permits his tenement to be in decay. 1 *Rol.* 508. *l. 34. Ow. 17.*

Or, pulls down a house newly built upon the copyhold. *R. 1 Bul. 51.*

Or, if he cuts down trees on pretence of repairs, and permits them to be rotten. *Per Clench, 1 Rol. 508. l. 52.*

[If he tops timber-trees, and makes them pollards. *Peachy v. D. of Somerset, T. 7 G. Str. 447.*]

[If he opens a new stone-quarry. *Ibid.*]

[If he grubs up and destroys hedges and boundaries. *Ibid.*]

So, if he builds a new messuage upon the copyhold. *R. 4 Leo. 241. Hut. 103. Lit. 266, 7.*

So, if a woman copyholder takes a husband, who does waste, it is a forfeiture. *Per two J. 4 Co. 27. a. Clifton. 1 Rol. 509. l. 25.*

And it is a forfeiture of the estate of the wife, tho' the husband dies; for waste tends to the disinherison of the lord. 1 *Rol.* 509. *l. 40. Vide post.* (M 5.)

So, it is a forfeiture, though he afterwards repairs. *Dub. Lat. 227.*

And by waste in one acre, or by cutting down one tree, the whole copyhold is forfeited. *R. 1 Rol. 509. l. 10. Vide post.* (M 5.)

But if a copyholder holds several copyholds by several tenures; waste in one is a forfeiture only of one intire copyhold, though they are all granted by the same copy. *R. 4 Co. 27. a. Cro. El. 353.*

So, if all escheat, and are re-granted *tenend' per antiqua servitia*; waste afterwards in one is a forfeiture of that only. *R. 4 Co. 27. a. 3 Leo. 109.*

But if a copyholder cuts down timber for repairs, it is no forfeiture; for he may do so without a special custom. *Per three J. Cro. El. 498. 1 Rol. 508. l. 40. Mo. 392.*

Though he cuts down more than he wants at present, and keeps the residue for future use; for he may not know precisely how much is necessary. *1 Rol. 508. l. 45. Cro. El. 499. Mo. 393.*

So, it is no forfeiture, if he fells the top and bark, when he cuts down timber for repairs. *R. 3 Bul. 282.*

Or, if he cuts down trees which the lord grants to him. *D. Mo. 94.*

So, it is no forfeiture, if a copyholder, who by custom may cut timber, does waste. *3 Bul. 81. Cro. Car. 221.*

When custom allows a copyholder to cut down trees. *Vide ante, (K 7.)*

So, it is no waste for a copyholder in fee, to dig, or open mines, in his soil. *Semb. 1 Sid. 152. (Vide 1 P. W. 406.)*

So, it is no forfeiture, if a stranger commits waste without the assent of the copyholder. *Per two J. 4 Co. 27. 1 Rol. 508. l. 37. D. cont. Mo. 49. Acc. 4 Leo. 241. D. acc. 1 Bul. 52. R. cont. and agreed to be settled. Lut. 802.*

Or, one who occupies with sufferance of the copyholder. *D. cont. Mo. 49. Dal. 49.*

So, though waste be done, *Chancery* will relieve against the forfeiture, upon satisfaction for it, if there was no intention to commit waste. *R. Ca. Ch. 96. 2 Ver. 664. Vide Chancery (2 V).*

As, if timber cut down was not used. *Ca. Ch. 96.*

Or, was used for the repair of another copyhold. *Ca. Ch. 96. R. 2 Ver. 537.*

Otherwise, if there was full and evident intention to commit waste, *Ca. Ch. 96.*

(M 4.) By denying Services, Fines, &c.

So, if a copyholder refuses his rent, or services, it is a forfeiture. *1 Rol. 506. l. 49. Dy. 211. b. in marg.*

As, if he refuses his rent at the day. *Hob. 135. 1 Rol. 506. l. 36.*

So, if he refuses suit at the court of the lord, upon sufficient summons. *R. 1 Rol. 506. l. 50. 3 Bul. 80. 268. R. 3 Leo. 108. R. 1 Rol. 429.*

So, if he does it not, upon frequent demands, tho' he does not positively refuse. *Vide Latch, 14.*

So, if he refuses to pay a fine evidently reasonable, upon demand. *1 Rol. 507. l. 20. Vide ante, (H 7.)*

So, if he says, that he is not ready to pay his rent, and the lord assigns a day certain, within the manor, for payment, and he does not pay it: it is a forfeiture, for it amounts to an absolute refusal. *R. Latch, 122.*

Though the place assigned for payment be not at the next court, but at some other place, within the manor. *R. Latch, 122.*

But it ought to be within the manor. *Ibid.*

And it ought to be an absolute refusal; for if the copyholder says, that

that he cannot pay his rent immediately, it is no forfeiture. *R. 1 Rol. 506. l. 45. Cro. El. 505. D. Ray. 42. Co. Ent. 647. d.*

Or, if upon demand of the rent at the time of payment, the copyholder is absent, which is a refusal in law; it is no forfeiture. *1 Rol. 506. l. 40.*

So, it is no forfeiture, if the rent be several times demanded, and not paid, if it be not denied. *R. Co. Ent. 288. b. Dub. Latch, 14. 122. and there Semb. cont. Acc. Lit. 268.*

So, not coming to court to do his suit, is no forfeiture, if he does not refuse to come. *R. Co. Ent. 288. b. R. 3 Bul. 80.*

So, it is no forfeiture, if a copyholder refuses his services, till the law determines what are due. *R. Latch, 14. 123. (Vide Ray. 42.)*

Or, before the rent is due, or a court is held, he says, that he will never pay his rent, or do his suit. *Per Popb. 3 Leo. 108.*

So, it is no forfeiture, if there be not sufficient notice; as if there be not a personal demand of the rent. *Hob. 135.*

So, there ought to be a personal warning to come to the court, to be held at such a place, and at such a time. *R. 1 Rol. 507. l. 2. Co. Ent. 288. b. 1 Leo. 104. per Coke.*

For a general summons of a court in the church, is not sufficient. *R. Co. Ent. 288. 1 Rol. 507. l. 10. R. Cro. El. 506. Cont. 1 Leo. 104.*

So, it is no forfeiture, if he has reasonable cause for his absence from court; as if he was sick. *1 Leo. 104.*

Or, attending upon a great office. *Ibid.*

So, it is no forfeiture, if a copyholder has no notice, that he who demands the services has an interest in the manor. *Semb. Latch, 122.*

As, if he refuses to the grantee or bargainee of the reversion before notice of an assignment. *R. 8 Co. 92. a. Vide Condition, (L 4.)*

So, Chancery will relieve against a forfeiture, if relief is prayed within a reasonable time. *2 Ver. 664.*

So, if a copyholder, sworn upon the homage in a court-baron, refuses to present according to his oath, it is a forfeiture. *Per three J. 1 Rol. 506. l. 32. Mo. 350. Dy. 211. R. 3 Leo. 109.*

Or, if he refuses to be sworn upon the homage. *Kit. 90. b. Per Gawdy, Mo. 350. Kit. 124. b.*

So, if a copyholder disclaims being tenant to the lord, it is a forfeiture. *Kit. 124. b.*

But if he says in court, that he renounces his copy, it is no forfeiture. *1 Rol. 507. l. 15.*

So, if the lord has *field-course* for sheep upon the land of his copyholders, inclosing of the copyhold, leaving space for the sheep, is not a forfeiture. *R. Hut. 103. Lit. 267.*

So, if a copyholder forges a *customary*, and makes use of it against the lord, it is a forfeiture; for the inheritance of the lord is in hazard by it. *Adm. 3 Leo. 108.*

So, if he defaces the *doal marks* which bound the copyhold. *Lit. 268.*

But forging a *customary*, without making use of it, is no forfeiture. *Dub. 3 Leo. 108.*

So, if a copyholder erects a mill upon his copyhold, without assent of his lord, it will be a forfeiture. *Dy. 211. b. in marg.*

So, by special custom, it is a forfeiture if the heir, or he to whose use

use a surrender is made, does not come to be admitted upon three proclamations at three several courts, 1 *Rol.* 568. l. 20. *Adm.* 8 Co. 99. 1 *Lev.* 63. *Vide ante*, (G 2.)

[But such default will be no forfeiture, without a special custom to warrant it. 3 *Term Rep.* 170. 172.]

[Yet the lord may seize the estate *quousque*. 3 *Term Rep.* 172.]

[But if he seize generally, it will be taken as an absolute seizure, and therefore irregular, and shall not afterwards be set up by the lord as a seizure *quousque*. *Id. ibid.*]

[No *infant* or *feme-covert* shall forfeit any copyhold messuages, &c. for their neglect or refusal to come to any court or courts, to be kept for any manor or manors, whereof such messuages, &c. are parcel, and to be admitted thereto, nor for the omission, denial or refusal of any such *infant* or *feme-covert*, to pay any fine or fines, imposed on their admittance to any such copyhold messuage, &c. *St.* 9 G. 1. c. 30. §. 5.]

[If one of several co-heirs of a copyholder be a *feme-covert* at the time of the ancestor's death, the lord cannot seize the whole estate, in default of the heir's not coming in to be admitted after three proclamations, though it be not known to the lord that one of them is a *feme-covert*. He must proceed according to the directions of this statute; for which, *see ante*, (H 6.)]

So, if the surrenderee does not come upon three proclamations, at the next court. 1 *Rol.* 568. l. 20.

So, by special custom, it is a forfeiture if a copyholder, into whose hands a surrender is made, out of court, according to the custom, does not present it at the next court.

But if a copyholder is outlawed, his copyhold is not forfeited, or determined. *R. Lit.* 234.

So, if a copyhold is surrendered to A. in trust for B. who is found to be an alien; the king shall not have the copyhold. *Semb. Al.* 15. *Agreed Hard.* 436.

If an alien purchases a copyhold in his own name, the king shall not have it, but the lord himself. *R. Dy.* 302. b. *in marg.*

(M 5.) What Estate shall be forfeited.

If a copyholder makes a feoffment of one acre, parcel of his copyhold, nothing shall be forfeited but that acre. *R.* 1 *Rol.* 509. l. 5.

But for waste in one parcel, the whole copyhold is forfeited. *Vide ante*, (M 3.)

So, if a copyholder for life commits a forfeiture, his estate for life only shall be forfeited, not the remainder. 1 *Rol.* 509. l. 15. *Cont. Mo.* 49. *Per Gawdy, acc. Cro. El.* 598. *R. acc. Cro. El.* 879. *Yel.* 1. *Noy*, 42.

As, if he makes a feoffment.

Commits waste. 1 *Rol.* 509. l. 20.

Does not come to be admitted. *R.* 1 *Rol.* 568. l. 25. *Yel.* 1 *Ray.* 404. *Per Eyre*, 3 *Mod.* 224.

So, if a lessee for years of a copyhold with licence, makes a feoffment, he forfeits only his term. 1 *Rol.* 509. l. 28.

So, if a copyholder, by licence, makes a lease, and afterwards commits a forfeiture; the lease is not forfeited. *Semb. Hob.* 177. *R.* 2 *Rol.* 372.

So,

So, if an husband seised in right of his wife makes a lease without licence, not allowed by the custom, he forfeits only during his own life. *R. 1 Rol. 509. l. 30. Cro. Car. 7. Dist. Cro. El. 149. Semb. 2 Rol. 344. 361. 372. R. 2 Rol. 271. l. 25.*

So, if a lessee of a copyhold for life, for years, or in tail, makes a lease by indenture, it is no forfeiture as to him in reversion. *R. 2 Rol. 271. l. 15. 20. 25.*

But if an husband seised in right of his wife does waste, he forfeits the estate of his wife also; for it tends to the disinherison of the lord. *1 Rol. 509. l. 40. Vide ante, (M 3.)*

So, if he refuses his rent or services. *D. Cro. El. 149. D. 2 Rol. 344.*
 'Tho' the husband dies before the entry of the lord. *Cont. per Dodd. 2 Rol. 344.*

So, if the husband commits felony, the free-bench or dower of his wife shall be forfeited, if it be not preserved by special custom. *Win. Ent.*

So, if a copyhold be granted to two for life *successive*, and the first commits waste, the whole estate is forfeited. *R. Mo. 49. D. Dal. 49.*

If a custom be, that the copyhold of a copyholder convicted of felony shall be forfeited; and the wife is admitted to the copyhold as her free-bench, and during her life the heir is convicted, his estate shall be forfeited. *R. 1 Leo. 1.*

[If *A.* devises copyhold to *B.* and surrenders to the use of his will, and *B.* is hanged for felony before admittance, or doing any act to shew he was tenant, the lands are not forfeited to the lord, but descend to the heir of *A.* *Roe v. Hicks, P. 27 G. 2. 2 Wils. 13. 16.]*

(M 6.) Who shall have Advantage of the Forfeiture.

[*Dominus pro tempore* shall take advantage of a forfeiture. *R. 1 Rol. 509. l. 50. And no other lord. 3 Term Rep. 173. except only in those cases where the act of forfeiture destroys the estate. Id. ibid.]*

So, the grantee of the inheritance of a copyhold. *R. 1 Rol. 510. l. 3. Mo. 399. 3. Cro. El. 492. Vide Ow. 63. Semb. cont.*

So, lessee for years of such a grantee. *R. 1 Rol. 510. l. 5. Dub. Cro. El. 499. Mo. 393.*

So, if the lord dies after forfeiture for waste, the heir shall take advantage of it. *Dub. Latch, 227. Cont. per three J. Powel. acc. Lut. 802.*

So, a lessee of a manor by lease made after a forfeiture committed shall take advantage of it. *R. 1 Rol. 510. l. 10. Cro. Car. 234.* But there the copyholder surrendered to the lord, not having notice of the forfeiture, who entred and made a lease, and by the entry the lord was in in his elder right.

So, the alienee of a manor, after a forfeiture committed. *Dub. 2 Vent. 39.*

But if the lord dies after a forfeiture committed, he in reversion, or remainder, shall not take advantage of it. *R. 2 Cro. 301. 1 Bul. 190.*

And for any forfeiture that does not determine the customary estate, the heir shall not take advantage. *R. per three J. Lut. 802.*

As, for waste. *Lut. 802. Dub. Latch, 227.*

By

By a lease without licence. *Lut.* 802. 1 *Sal.* 187.

So, if two parceners be ladies, and one dies, the other being heir to her sister, shall not take advantage; for she cannot enter for a moiety. *R. per three J. Lut.* 802. 1 *Sal.* 187.

And upon forfeiture for treason, the lord shall take advantage, not the king, unless by the express words of an act of parliament. 2 *Vent.* 39. *Vide ante*, (M 1.)

If a copyholder for life forfeits, the lord shall take advantage, not he in remainder. 1 *Roll.* 500. l. 45. *R.* 9 *Co.* 107. a. *M. Podger.* 1 *Sand.* 151. *R.* 1 *Mod.* 200. 2 *Mod.* 33.

Except when the remainder is to commence after forfeiture, &c. *R.* 2 *Jon.* 189. 3 *Lev.* 94. But there it was not a remainder but a reversion. *Pol.* 620. *Vide infra. Vide post.* (M 7.)

But if a surrender be to *A.* and *B.* and the heirs of *A.*, but *B.* upon three proclamations, according to the custom, does not come to be admitted, *A.* shall be admitted to the whole, and not the lord to a moiety. *Dub. Yel.* 1.

So, if a reversion of a copyhold be granted *habend'* after the death, surrender, or forfeiture of the copyholder for life; if he forfeits, the reversioner shall take advantage, and not the lord. *R.* 3 *Lev.* 94. *Pol.* 621. 2 *Jon.* 189.

So, if a forfeiture be such, that it determines the customary estate, the heir shall take advantage of it; as if a copyholder makes a feoffment, or lease for life. *R. Lut.* 803.

(M 7.) When a Presentment is not necessary.

If a copyholder commits a forfeiture, by treason or felony, after attainder, the lord may seize without presentment by the homage. *R.* 2 *Vent.* 38. 2 *Jon.* 190.

Or, by alienation. *Kit.* 90. b. *R. Cro. El.* 499.

Or, by waste. *Cont. Kit.* 90. b. *Semb. acc. Latch*, 227. *R. Cro. El.* 499.

Or, by a lease without licence. *R. Jon.* 249.

So, the lord may grant a copyhold forfeited, before seizure; for the forfeiture is a determination of the will, of which the lord may take advantage. *R.* 1 *Lev.* 26.

So, a grantee *habendum* after forfeiture, &c. may enter, before seizure, upon an attainder of the copyholder. *Semb.* 2 *Jon.* 189. *R.* 3 *Lev.* 94.

But for a forfeiture by non-feasance, the lord cannot seize without a presentment of the homage; as for not rendring services, or suit of court. *Kit.* 90. b.

Nor for any personal forfeiture. *R.* 4 *Leo.* 241.

(M 8.) Dispensation; What shall be.

If the lord makes an admittance to the copyholder, after a forfeiture committed, it amounts to a dispensation; for it shall be taken as an entry, and a new grant. *R.* 1 *Lev.* 26. [*Vid.* 3 *Term Rep.* 171. where it is said by *Ld. Kenyon*, that the word "*dispenses*," shews that he does not make a new grant, but admits the tenant to be in of his old title.]

So, if he accepts rent of the copyholder. *Per Twisd.* 1 *Keb.* 15. *Vide Condition (P).* So,

So, if a copyholder be amerced at the court for not coming; it will be a dispensation of the forfeiture. *R. 1 Leo. 104.*

[So, if after a forfeiture committed which may be waved, the lord do any solemn acts to shew that he waves it, as if he admit a presentment that the tenant forfeiting died seised, and require, by proclamation his heir to come in. *3 Term Rep. 471.*]

[So, if he do not avail himself of his right to seize, within 20 years. *Semb. sed quar. Id. 172. 273.*]

Though the amercement be not estreated or levied. *1 Leo. 104.*

If permissive waste be repaired before entry, it prevents the seizure, as forfeited. *R. Powel, Lut. 803.*

And a dispensation by him who is the rightful lord, tho' he be only *dominus pro tempore*, binds him in reversion, as well as himself. *R. 1 Lev. 26.*

But an admittance after a forfeiture by a disseisor, is not a dispensation, as to him who has the right. *R. 1 Lev. 26.*

So, it shall be no dispensation, if the lord had not notice; as if he accepts rent of a copyholder after waste done, without notice of it, he may afterwards enter for a forfeiture. *R. 1 Rol. 475. l. 50.*

So, if the lord accepts a surrender of the copyholder, after treason committed. *R. 2 Vent. 38.*

So, a pardon of treason, is no dispensation. *R. 3 Lev. 94. R. 2 Jon. 189.*

So, if the lord accepts a surrender of a copyhold after a forfeiture committed, and before notice of it, it is no dispensation. *R. Cro. Car. 234.*

Yet the lord ought to take notice of a forfeiture, by denial of suit of court. *2 Vent. 39.*

Or non-payment of rent. *D. 2 Vent. 39.*

(N) Copyhold, When bound by a Statute.

WHEN no prejudice ensues to the lord by it, copyholds are included within the general words in any statute, *viz. lands, tenements, and hereditaments.* *3 Lev. 327. R. 3 Co. 8. D. Cro. Car. 43, 44. Sav. 67.*

As the *st. of Merton*, 20 *H. 3.* by which damages are given to the wife for being deforced of her dower, when her husband dies seised, extends to copyholds. *Cro. Car. 43. Vide ante, (K 2.)*

So, the *st. W. 2. 13 Ed. 1. 3.* which gives a *cui in vita* upon alienation by the husband of the land of his wife. *Cro. Car. 43. 3 Co. 9. a. Dal. 116.*

So, the other branch of *W. 2. 3.* which gives receipt to the wife, upon default of her husband, extends to the default of the husband in a writ of right, in a court-baron. *2 Inst. 343. 3 Co. 9. a. Cro. Car. 43.*

So, the *st. W. 2. 4.* which gives a *quod ei desorceat* upon a recovery by default against tenant for life, &c. *3 Co. 9. a. Cro. Car. 43.*

So, the *st. 4 H. 7. 24.* whereby a fine, with proclamations and non-claim for five years, bars all estates, &c. extends to a customary interest. *R. 9 Co. 105. 1 Brow. 181. 2 Inst. 517.*

And therefore, if the lord enfeoffs a copyholder in tail, who afterwards levies a fine *sur consufance*, &c. the issue in tail is barred. *R. Cart. 23.*

But

But if the lord makes a bargain and sale to a copyholder for life, who afterwards levies a fine *sur consueance*, &c. and five years pass, he in remainder is not barred by the *st.* 4 *H.* 7. 24. for the remainder was not divested. *R.* 9 *Co.* 106. *Vide ante*, (L—M 5.)

So, copyholder for three lives *successive*, the first life joins with the lord in a fine *come ceo*, &c. of the copyhold estate: it does not bar the second life. *R.* 2 *Jen.* 143. *Ray.* 403. *Pol.* 564.

So the *st.* 31 *H.* 8. 13. which avoids leases for life made by religious persons within a year before, extends to copyholds. *R.* 3 *Co.* 8. *Mo.* 128. *Sav.* 66.

So, the *st.* 32 *H.* 8. 9. against champerty and maintenance in the purchase of titles, &c. *Per Wray*, 4 *Co.* 26. *a.* *Cro. Car.* 43. 2 *Brow.* 79.

And the *st.* 32 *H.* 8. 34. which gives to a grantee of the reversion, the same actions and entry for a condition broken, as the grantor might have, extends to the assignee of a reversion of a copyhold. *Cont.* *R.* 2 *Cro.* 505. *Yel.* 223. *Per Hob.* 178. *Dub. Cro. Car.* 25. *D. Cro. Car.* 44. *but R. acc.* 3 *Lev.* 327. *Vide ante*, (K 12.)

So, the *st.* 32 *H.* 8. 2. of limitations. *Mo.* 411.

So, the *st.* 13 *El.* 20. which restrains long leases made by ecclesiastical persons. 3 *Lev.* 327.

So, the *st.* 27 *El.* 4. which restrains fraudulent conveyances. 3 *Lev.* 327. [*Vid. Cowp.* 710. 713, 714.]

So, the *st.* 1 *Jac.* 15 & 21 *Jac.* 19. against bankrupts; for being named by the *st.* 13 *El.* 7. the other statutes, made in aid and confirmation of this, extends to copyholds. *R.* *Cro. Car.* 550. *Adm. Cro. Car.* 568.

By the *st.* 13 *El.* 7. Commissioners may take order with bankrupt's lands, &c. as well customary as free, &c. And by deed indented and inrolled make sale of such lands, &c. But the vendee shall not enter, nor take the profits till he hath agreed with the lord for his fine, who thereupon shall admit him.

But the estate of a copyholder is vested in the bargainee, by the bargain and sale. *Cro. Car.* 569. *Vide ante*, (G 1.)

And he shall avoid all mesne acts between the sale and his admittance; as, if the bankrupt dies after sale, and before admittance of the vendee, the wife of the bankrupt shall not have her dower. *R.* *Cro. Car.* 569. *Vide ante*, (G 1.)

So, the *st.* *W.* 2. 13 *Ed.* 1. *de donis* extends to copyholds. *R.* 3 *Co.* 8. *R.* 9 *Co.* 105. *cont.* *D. cont.* *Sav.* 67. *Vide ante*, (C 8.) *But it was R. acc.* 3 *Lev.* 327. *Cont.* 1 *Roll.* 838. *l.* 15. *Semb. acc.* 1 *Leo.* 175. *Dub. Cro. El.* 380. *Adm.* 1 *Sid.* 314.

(O) When not.

BUT when a statute alters the service, tenure, custom, or interest of the land, to the prejudice of the lord, the general words of the statute do not extend to a copyhold. *R.* 3 *Co.* 9. *a.* *D. Cro. Car.* 44.

And, therefore, a copyhold is not extendible upon a stat. merchant or staple within the *st.* of *Acton Burnel*, 11 *Ed.* 1. *De Mercat.* 13 *Ed.* 1. *Mo.* 94. 128.

Nor by the *st.* *W.* 2. 13 *Ed.* 1. 18. which gives an *e'git.* *R.* 3 *Co.* 9. *a.* *Cro. Car.* 44. *Sav.* 67.

So,

So, the *ft. of Gloucester*, 6 *Ed.* 1. which gives fummons *ad warrantizandum* upon a foreign voucher, does not extend to copyholds. 2 *Inst.* 325.

Nor, the *ft.* 23 *H.* 8. 5. which gives authority to commissioners of sewers to sell lands. *Cal.* 134, 5. (*Callis, Seward's edit.* 1686.)

Nor, the *ft.* 27 *H.* 8. 10. which transfers the possession to the use; for it will be a prejudice to the lord to have the possession transferred by the statute without the allowance of the lord. *D. Cro. Car.* 44.

Nor, the clause which enables to make a jointure of lands.

Nor, the *ft.* 31 *H.* 8. 1. nor the *ft.* 32 *H.* 8. 32. which compel joint-tenants and tenants in common to make partition. *Cro. Car.* 44.

Nor, the *ft.* 32 *H.* 8. 28. which enables tenants in tail, and husband and wife, to make leases for twenty-one years. *Cro. Car.* 44. *Dal.* 116.

Nor, the *ft.* 32 *H.* 8. 37. which gives remedy to executors or administrators for rent-arrear, by distress, or action of debt. *R. Yel.* 135. *Vide ante*, (K 12.)

Nor, the *ft.* 29 *El.* 6. which gives to the king, the lands of recusants. *R. 1 Leo.* 98. *Ow.* 37. *D. Hard.* 433.

Nor, the *ft.* 31 *El.* 7. which prohibits the erection of cottages without four acres of land. *R. 1 Bul.* 52.

Nor, the *ft.* 12 *Car.* 2. 24. which enables the father to dispose of the guardianship of his son. *R. 3 Lev.* 395. *Lut.* 1190. *Vide ante*, (K 5.)

[Nor, the *ft.* 14 *G.* 2. c. 20. s. 9. relative to estates *pur autre vie*. *Dict. obiter per Lord Hardwicke. Ambler*, 152. *Sed quare.*]

(P) Copyholder, how impleaded.

(P 1.) In the Lord's Court.

A Copyholder shall not implead, nor be impleaded for his tenements by the king's writ. *Lit. S.* 76.

And, therefore, if he implead another for his tenements, he shall have a plaint in the lord's court, and make protestation to sue in the nature of an assise of *novel disseisin*, of an assise of *mortdancestor*, of a *formedon*, or other action at common law. *Lit. S.* 76. *F. N. B.* 12. *B.*

So, in nature of a writ of right. 3 *Leo.* 99.

And, if an erroneous judgment be given, a copyholder shall not have a writ of false judgment, in respect of the baseness of his estate; but he ought to sue to the lord by petition. *Co. L.* 60. a. *F. N. B.* 12. *B.* *D.* 4 *Co.* 30. b. *Ca. Parl.* 67. *Mo.* 69.

So, if he be distrained for more customs or services than he ought, he shall not have a *monstraverunt*. *F. N. B.* 14. *D.* 16. *E.*

So, if a copyholder surrenders to *A.* upon trust, and the trust be not performed; he may sue to the lord by petition, and compel performance of the trust. *R. 1 Leo.* 2.

And if the lord decrees a surrender to *A.*, and the party refuses, the lord may seise, and admit *A.* *R. 1 Leo.* 2.

(P 2.) In Chancery.

But if the lord refuses admittance to the heir or surrenderee, the copyholder may sue in Chancery, and shall be there relieved. 2 *Cro.* 368. *Vide ante*, (G 10.)

So,

So, if the lord ousts his tenant without cause.

So, if he ousts his copyholder for an involuntary forfeiture. *Ca. Ch. 96. Vide ante, (M 3.)*

So, if he demands an excessive fine. *Ch. R. 464.*

Or, more services than he ought.

So, if the lord refuses to hold a court to do right to his copyholder. *Adm. Ca. Parl. 67. Vide ante, (C 9.)*

Or, refuses to do right, upon a petition to him after an erroneous judgment. *Adm. Ca. Parl. 67. 4 Co. 30. b. [Vid. 1 P. W. 336.]*

Or, refuses to grant licence to make leases.

So, if a copyhold be surrendered to *B.* for payment of an annuity, or other trust, *Chancery* will compel the performance.

So, if an erroneous judgment be in a customary court, in an action in the nature of a formedon; *Chancery* upon a bill in the nature of false judgment will reverse it. *R. 1 Rol. 373. l. 45. Lane, 98.*

So, the *Exchequer*; if it be in the king's manor. *R. 1 Rol. 539. l. 20. Lane, 98.*

So, *Chancery* will ascertain the customs of a manor between the lord and his tenants.

And ascertain the limits of copyhold and freehold tenements, which are confused.

So, *Chancery* will relieve against a defective surrender. *Ca. Ch. 171. Vide ante, (F 10.)*

If the surrender be not presented. *Ca. Ch. 171.*

If a copyhold is agreed to be enfranchised, and the freehold is conveyed to a trustee without a surrender of the copyhold to him. *R. 1 Ver. 392.*

If a surrender be made into the hands of one, and not of two copyholders. *2 Ver. 164.*

So, if a surrender be refused. *2 Ver. 585.*

So, a devise or settlement of a trust of a copyhold shall be good, without a surrender. *2 Ver. 585. 704.*

So, *Chancery* will supply the default of a surrender to the use of a will, when the rolls are lost, and long possession has been under the will. *R. 2 Ca. Ch. 151. 1 Ver. 195. Vide Chancery (2 V).*

So, in favour of a purchaser. *2 Ver. 163.*

Or, for the provision of a younger son or daughter. *1 Sal. 187.*

Tho' he has some other maintenance. *Ibid.*

Otherwise, if the eldest son be thereby disinherited. *Ibid.*

Or, it was for the provision of a grandson. *R. in Parl. 1 Sal. 187. 2 Ver. 625. (Vide 1 P. W. 61.)*

Or, for the provision of a nephew. *R. 2 Ver. 625.*

So, it will supply it for the heir, when the copyhold was gavel-kind, and charged with legacies to the younger children. *R. 2 Ver. 165.*

But *Chancery* will not relieve the lord of a manor, after a sale of the manor, for rents or fines due before the sale. *R. 1 Rol. 374. l. 45.*

Nor will compel the lord of a manor to receive a petition, to reverse a common recovery. *R. Ca. Parl. 68.*

Vide Chancery (2 V).

(P 3.) At Common Law.

So, a copyholder shall have trespass by the common law, for a trespass done upon his copyhold. *Per Danby*, 7 *Ed.* 4. 19. *a.* 2 *H.* 4. 12. *a.*

And shall have it against his lord, if he enters upon him without cause. *Per Danby*, 7 *Ed.* 4. 19. *Per Brian*, 21 *Ed.* 4. 80. *Co. L.* 60. *b.*

Or, if he cuts down trees, not being timber. *R.* 1 *Leo.* 272.

So, an action upon the case lies against the lord, if he cuts down timber, when by the custom it belongs to the copyholder. *Vide ante*, (K 7.)

So, the lessee of a copyholder shall maintain an ejectment at common law. *R.* 4 *Co.* 26. *Melwich.* *D. Mo.* 128. 272. *R. Mo.* 539. 569. *Per three J. cont.* *Cro. El.* 483. 717. *R. acc. Cro. El.* 224. 1 *Leo.* 328. *Cro. El.* 535.

Otherwise, if the lessee has not a rightful estate; as, if the lease be for several years without licence, he shall not have an ejectment against the lord. *D. Lit.* 234.

Nor, against a stranger. *Dub. Lit.* 234.

So, if a man ousts a copyholder of a manor in the king's hands, he cannot maintain an ejectment. *R.* 3 *Leo.* 221.

So, a copyholder cannot maintain ejectment upon the demise of the lord by copy. *Cro. El.* 224. 1 *Leo.* 328.

So, if a *replevin* be upon a distress for rent of a copyhold, the defendant may avow for it in the king's court. *R. Cro. El.* 524.

So, an *ejectione custodie* lies for a guardian, appointed by the lord of the manor according to the custom; for he does not claim by copy, but has an interest at common law. *R. Cro. El.* 224. 1 *Leo.* 328.

(P 4.) Pleading of Copyhold.

If a man entitles himself to a copyhold, he ought in pleading to shew a grant by the lord to him. *Cro. Car.* 190. *Vide Pleader*, (E 19.)

So, if he intitles himself under *A.* he ought to shew a grant to *A.* *R.* 2 *Cro.* 103. *R. Cro. Car.* 190.

But it is only form, and aided upon a general demurrer. *Per three J. Cro. Car.* 190. *Semb. cont.* 2 *Cro.* 103.

And if he entitles himself to the reversion after the death of *A.* it is sufficient to shew a grant of the reversion, without shewing a grant of the estate to *A.* *R.* 2 *Cro.* 52.

It is not sufficient, to plead that the tenements are granted by copy, without saying, *ad voluntatem domini.* *Lut.* 1166. 1171. *R. Lut.* 126. *Semb. Cro. Car.* 229.

[Copyhold must be stated, or found, or pleaded to have been demisable by copy of court-roll time out of mind, or it will not be adjudged copyhold. *Roe v. Newman*, P. 33 G. 2. 2 *Wils.* 125.]

So, he cannot plead, that they are copyhold, and descendible to the heir; for that is a contradiction. *R. upon a special demurrer*, *Lut.* 1328.

That *A.* was seised in fee *secundum consuetudinem manerii*, without saying by copy or the like. *R.* 3 *Bul.* 230.

But the omission of, *ad voluntatem domini*, shall be aided after verdict. *R.* 1 *Sal.* 365.

So, it is not sufficient to plead, that the land is demisable time whereof, &c. without saying in fee, or for life, &c. *Sav.* 131.

That the copyhold was granted by the steward, without naming him. *Sav. 131.*

The form of pleading an admittance to a copyhold. *Vide Co. Ent. 575. b.*

Of a surrender and admittance thereupon. *Co. Ent. 645. d.*

Of a surrender by an husband and wife. *3 Lev. 147. Co. Ent. 576. b.*

Of a surrender to the use of a will. *Lut. 759. 794.*

To two tenants. *3 Lev. 128. Co. Ent. 575. b.*

By attorney. *Lut. 760.*

To the lord out of the manor. *Lut. 677.*

Of a grant and admittance to a reversion. *Co. Ent. 184, 185.*

If a copyholder claims common, or other profit, *in alieno solo*, he ought to prescribe in the name of the lord. *R. 4 Co. 31. b. Foiston. Cro. El. 390. Mo. 461. Lut. 1327. 1 Sal. 170.*

But if he claims it within the manor, he ought to allege it by way of a custom; for he cannot prescribe in himself, for the baseness of his estate. *R. 4 Co. 31. b. Cro. El. 390. Mo. 461. Lut. 1326. R. 6 Co. 60. b.*

And therefore, if he alleges a custom within his manor, *quod quilibet tenens customar'* of such a tenement shall have common of estovers in another manor, it is bad. *R. Dy. 363. b. 4 Co. 31. b.*

But, if a copyholder pleads a lease, it is not necessary to plead a custom; for it shall be intended pursuant to the custom, if the contrary be not shewn on the other side. *D. 1 Leo. 100.*

So, he may plead a demise for a year, without a licence. *Co. Ent. 576. a. Win. Ent. 998.*

But, a demise for several years shall be pleaded with a licence. *Co. Ent. 185. a.*

If a copyholder alleges a custom, it is more proper to say positively, *quod infra manerium talis habet' consuetudo*, &c. *Semb. Lut. 1188, 9.*

Yet it is sufficient to say, *eo quod secundum consuetudinem*, &c. *R. Lut. 1190.*

Or, *quod cum per consuetudinem manerii habere debeat*. *R. 1 Sal. 365.* after a verdict.

If a copyholder alleges a custom within the manor for common, &c. it is not necessary to say, what estate they have in their tenements; for be it for life, for years, or in fee, the common, &c. belongs to them for the time. *R. 2 Saund. 326.*

So, it is not necessary to say, that common belongs *ad statum customarium*; for, *ad tenementa sua predicta spectant*, is sufficient. *R. 1 Sal. 366.*

(Q) Manor.

(Q 1.) What shall be.

ALL copyholds, regularly, are parcel of a manor. *Vide ante, (B 2.)*

A manor commenced, where the king granted lands with jurisdiction to another, who before the *fl. quia emptores terrarum* granted parcel of them to others, to hold of him by certain services. *Co L. 58.*

Every manor consists of demenses and services.

To

[To constitute a manor it is necessary not only that there should be two freeholders within the manor, but two freeholders holding of the manor subject to escheats. *Per Lord Kenyon C. J. Glover v. Lane, B. R. M. 30 Geo. 3. 3 T. R. 447.*]

[To constitute a court-baron, it must be holden before two freeholders at least. *Bradshaw v. Lawson, B. R. M. 32 Geo. 3. 4 T. R. 443. Infra, (Q 5.)*]

If parceners make partition of a manor, and parcel of the demesnes and services are allotted to one, and parcel to the other; each has a manor. *2 Rol. 122. l. 15.*

And if, by descent the part of one comes to the other, it shall be one manor again. *2 Rol. 122. l. 25.*

So, if a manor extends to *A.* and *B.*, and he grants the demesnes and services in *A.* The grantee has a manor, and the grantor has another manor in *B.* *Per two J. Cro. El. 19. Per two J. Periam cont. Cro. El. 39. Ow. 138.*

So, a manor may be parcel of another manor, and held of it. *1 Bul. 54.*

So, it may be held of another, by copy. *Vide ante, (C 1.)*

(Q 2.) What is Parcel of a Manor.

The demesnes are parcel of a manor.

So, rents and services. *2 Rol. 120.*

So, a rent-seck may be parcel of a manor; for it may have a lawful commencement, by release from the lord to the tenant, reserving the rent, or by purchase of the tenancy by the lord *paramount*. *2 Rol. 120. l. 25.*

So, rent for owelty of partition. *2 Rol. 120. l. 30.*

If a man makes a gift in tail, or a lease for life or years of part of the demesnes of a manor; the reversion continues parcel of the manor. *Co. L. 324. b. Win. 46. R. Cro. Car. 308.*

So, if he leases all the demesnes for life, or years, rendering rent; the reversion is parcel of the manor. *2 Rol. 120. l. 50.*

So, if he grants an advowson, &c. for life: the reversion continues parcel of the manor. *2 Rol. 121. l. 2.*

If husband and wife join in a lease for life of part of the wife's manor; the reversion continues parcel, for the wife's joining prevents a discontinuance. *2 Rol. 120. l. 45.*

If a bishop makes a lease for life, not warranted by statute; the reversion is parcel of the manor, for the lease makes no discontinuance. *R. 2 Rol. 121. l. 25.*

So, if the lord leases the whole manor for years, except one acre; this is parcel of the manor. *Co. L. 325. a. R. 5 Co. 11. b. Cro. El. 522. Dub. Pl. Com. 104.*

So, if he leases an acre for years, and afterwards leases the whole manor for several years; this acre passes as parcel, without attornment of the lessee. *2 Rol. 121. l. 15.*

So, if parceners continue a residue of the manor in parcenary, but divide part of the demesnes; they continue parcel of the manor. *Sav. 113.*

(Q 3.) What is not a Manor.

But a manor cannot begin at this day. *2 Rol. 120. l. 10. Cro. El. 39.*

And therefore, if a man makes gifts in tail, &c. rendring rent, and suit at court, it shall not be a manor; for he cannot make a court, tho' the tenure is good. 2 *Rol.* 120. l. 15.

If the king grants, rendring rent, *tenend.* of his manor of G. the services are not parcel of his manor. *Cro. El.* 39.

(Q 4.) What is a Severance of a Manor.

So, land held in fee of a manor is not parcel of a manor, but the rent and services only. 2 *Rol.* 120. C.

So, an annuity cannot be parcel of a manor. 2 *Rol.* 120. l. 20.

Nor a rent-charge. *Co. El.* 150. b.

So, if the lord makes a gift in tail, or leases the manor for life, saving one acre, this being severed from the freehold does not remain parcel of the manor. *Co. El.* 325. a. 5 *Co.* 11. b.

So, if he leases the manor for life, except the advowson, &c. it is not parcel of the manor. 2 *Rol.* 121. l. 5. 5 *Co.* 11. b.

So, if husband and wife seised of the wife's manor make a lease of part for life, and afterwards grant the reversion to the lessee, it will be severed from the manor. 2 *Rol.* 121. l. 10.

So, if tenant in tail makes a lease for life of a tenement, part of his manor, not warranted by the statute; it is severed from the manor, for it makes a discontinuance. *R.* 2 *Rol.* 121. l. 35. *Win.* 46.

If there be a partition, and one has the demesnes of the manor, and the other the services, the demesnes are severed from the manor. *Sav.* 113.

Or, where one has the manor, the other an advowson, villein, &c. these are severed. *Ibid.*

So, if the wife of the lord of the manor demands, and recovers dower, by the name of the third part of *tot. messuag. tot. acr. terr.* &c. she shall not have any manor. *Ow.* 4.

Tho' the sheriff delivers to her seisin of the third part of the demesnes, and services; for as to the services, it is void. *R.* *Ow.* 4.

So, if there be an extent of *tot. acr. terr.*, &c. neither the manor, nor any thing appendant passes. *Ow.* 4.

If an advowson, acre of land, &c. be severed from the manor, tho' they be regranted, they shall never afterwards be appendant. 2 *Mod.* 2. *Vide Appendant and Appurtenant (D).*

(Q 5.) Manor, how destroyed.

If all the freeholds escheat to the lord, the manor is extinct; for there cannot be a manor, without a court-baron, nor a court, without two suitors at least. 2 *Rol.* 122. l. 2. 5. 4 *T. R.* 443.

So, if the lord purchase all of them in fee. 2 *Rol.* 122. l. 2.

So, if all the services are extinct, the manor fails. *Yel.* 191.

So, if a manor descends to parceners, and upon petition all the demesnes are allotted to one, and all the services to the other; the manor is gone. 2 *Rol.* 122. l. 10. *Per three J.* 1 *Leo.* 204.

(Q 6.) How revived.

But where the severance which destroys a manor is by act of the law, it may be revived: as, if the demesnes are allotted to one parcener, and the services to the other, and one dies without issue, whereby

whereby her part descends to her sister, the manor shall be revived.
2 *Roll.* 122. l. 10. 25. 1 *Lev.* 204.

(Q 7.) How it shall be pleaded.

If a man pleads, that he or another is seised of a manor, he ought to allege the name of the manor, and it is not sufficient to say, that he was seised of a manor in such a parish. R. 2 *Lev.* 178.

(R 1.) Court-Baron.

TO every manor a court-baron is incident. Co. L. 58.

And therefore in a *quo warranto* for holding a court-baron, it is sufficient to plead, that he has a manor. 1 *Bul.* 54. 2 *Cro.* 260.

And if he pleads, that he has a manor, he ought not to prescribe for holding a court-baron. R. *Noy*, 20.

So, if he grants a manor, the court-baron passes as incident.

Tho' he accepts all courts; for the exception is void, unless in the case of the king. R. *Mo.* 870.

And the profits of courts may be excepted by a common person. *Ibid.*

So, if the court of a manor prescribes for suit *his in anno*, it may be a court-baron. *Sal.* 604.

But there cannot be a court-baron without freeholders. Co. L. 58. a. [*Chetwode v. Crew*, C. P. E. 19 *Geo.* 2. *Willes*, 614.]

[Such freehold tenants cannot be created at this day. *Ibid.*]

[If the lord now convey part of the demesnes of the manor to A. and his heirs, and other part to B. and his heirs, to hold as of his manor by fealty and suit of court, and then hold a court before those two tenants as free-tenants, the court is improperly holden, and any amercement at that court is consequently bad. *Ibid.*]

And therefore, where a manor is granted by copy, it may have a customary court, but shall not have a court-baron. R. 2 *Cro.* 260. *Vel.* 190.

(R 2.) Customary Court.

So, a manor has a customary court, as well as a court-baron. Co. L. 58. a.

And this concerns the copyhold tenants only. *Ibid.*

And may be held without freeholders. *Ibid.*

If a manor has a court of a double nature, viz. customary and court-baron, the proceedings of both may be entred in the same roll. *Ibid.*

But there cannot be a customary court without copyholders. *Ibid.*

(R 3.) Who shall be Judge.

In a court-baron the freeholders are the judges. Co. L. 58. a. [4 *T. R.* 484.]

Tho' it be upon a writ of *right patron*, direct to the lord, or his bailiffs *quod rectum teneant*. R. *Mo.* 1.

But in the customary court the lord or his steward is the judge. Co. L. 58. a.

(R 4.) In what Place it shall be held.

The court-baron ought to be held within the manor, otherwise it will be void. *Co. L. 58. a.*

But, by custom, the lord may hold a court, within one manor, for several manors. *Co. L. 58. a. Cro. Car. 367.*

So, a surrender may be made out of the manor. *Vide ante, (F 2, &c.)*

So, an admittance by the lord himself, tho' not by the steward. *Vide ante, (G 7.)*

So, a court may be held in the night, *post occasum solis. R. Mo. 68.*

(R 5.) Steward.

(R 5.) *How retained.*] A steward ought to be *fidelis, discretus, &c. Fleta, lib. 2. cap. 66. Co. L. 61. b.*

And may be retained by deed, or by *parol. Co. L. 61. b. R. Dy. 248. a.*

A retainer by *parol* may be for a court-leet, as well as for a court-baron. *Co. L. 61. b.*

A retainer by *parol* continues till it be discharged. *Ibid.*

A steward may make a deputy.

And a grant to an infant to be steward *per se, vel deputat.*, will be good. *Cant. Co. El. 3. b. Cro. El. 637. R. acc. Cro. Car. 279.*

Jon. 310. R. 2 Jon. 126. Vide Infant, (C 1.) Vide Officer, (B 3.)

So, a grant in reversion shall be good. *R. 2 Jon. 126.*

Or, a grant to two. *R. 2 Jon. 127.*

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So, a grant of a stewardship of courts leet and baron shall be good for the court-baron; tho' it would not for the leet. *R. 2 Jon. 126.*

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Who is a sufficient steward to make a grant, &c. *Vide ante, (C 5.)*

(R 6.) *The duty of the steward.*] A steward may make a grant or admittance, or take a surrender of copyholds. *Vide ante, (C 5.—F 3.—G 6, 7.)*

(R 7.) The Form of holding the Court.

(R 7.) *Precept for it.*] The usual method of holding a court-baron, or leet, is, that the steward makes a precept to give reasonable warning of the court. *Kit. 6. a.*

Warning for fifteen days is best, which is the common time between the *teste* and return of a writ in C. B. *Kit. 6. a.*

But six or seven days is sufficient. *Ibid.*

A precept to warn a court. *A. B. seneschallus ballivo manerii predicti salutem. Tibi precipio & pariter mando quod diligenter pramonire facias visum franc. pleg. cum curia baron. ibidem tenend. erga diem Jovis, videlicet, 12^m diem Octobris prox. futur. post datum present. et habeas ibi hoc precept. & qualiter, &c. Dat sub sigillo meo 1^o die hujus mensis Octobris anno regni, &c.*

(R 8.) Style of the Court.

The style of the court contains the time and place, and before what steward it is held. *Kit. 6. b. 53. b.*

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(R 9.) Proclamation.

After the style of the court is entred, the steward causes the bailiff to make proclamation, by *O yes.* *Kit. 6. b. 53.*

None can make proclamation, but by authority of the king, or by custom. *Kit. 6. b.*

At the adjournment of a term, or other matter for the king, three proclamations shall be made at the beginning. *Ibid.*

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After proclamation made, the suitors, or resiants, shall be called. *Kit. 6. b. 53. b.*

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And he may be effoigned by attorney. *1 Leo. 104.*

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(R 13.) *In actions personal. When allowed.]* A court-baron may hold plea of actions personal; where the debt or damages are under 40 s. *Noy, 20. Vide Kit. 74. b.*

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So, in *detinue* of goods. *Vide Kit. 74. b.*

So, in trespasss, without *vi & armis*, under 40 s. *Vide Kit. 74. a.*

So, an action lies there by the lord himself; for the suitors are the judges. *Vide Kit. 74. a.*

So, by a stranger who comes into the manor. *Vide Kit. 74. b.*

(R 14.) *When not.*] But a court-baron cannot hold plea of common right, above 40s. *Vide County, (C 8.)*

And if it does by prescription, it is not properly a court-baron, but a court of record, and error will lie upon a judgment there. *Noy, 20.*

So, it cannot divide a debt into several plaints, each under 40s. *Vide Kit. 74. a.*

So, trespass does not lie there *vi et armis*. *Vide Kit. 74. b. 75. b.*

Nor, trespass by *Justicies*; for it cannot be directed to the steward. *Vide Kit. 74. b.*

So, in trespass without *vi & armis*, if the defendant pleads freehold, the court cannot proceed. *Vide Kit. 74. a.*

Or, if he pleads, that the plaintiff is his villein. *Ibid.*

So, accompt does not lie in a court-baron. *Vide Kit. 74. b.*

Nor *detinue* of charters. *Vide Kit. 74. a. 75. b.*

Nor *replevin*, except where the lord claims it, by charter or prescription. *Kit. 74. b.*

Nor waste. *Vide Kit. 76. a.*

Nor ejection of ward. *Ibid.*

Nor *ejectione firmæ*. *Ibid.*

Nor assize. *Ibid.*

Nor *quare impedit*, or other mixt action. *Ibid.*

Nor an action upon any statute. *Ibid.*

If an action be sued in a court-baron, in which it has no jurisdiction, prohibition may be sued. *Vide Kit. 74. a. 75. a.*

So, if a plea be pleaded which ousts the jurisdiction there. *Vide Kit. 75. a.*

So, if the defendant pleads, that the cause of action did not arise within the jurisdiction, and the plea is disallowed, upon *affidavit* a prohibition shall go. *Vide Kit. 74, 75, &c.*

So, to trespass *vi & armis*, a *superfedeas* may be granted. *Vide Kit. 75. b.*

So, if it has no jurisdiction, the proceeding there is void, and trespass lies. *Ibid.*

(R 15.) *In actions for land freehold.*] So, in a court-baron a writ of *right patent* may be sued, directed to the lord, or if he be out of the realm, to his bailiff, to do right, where his tenant in fee loses by default, or dies seised, and a stranger abates.

When it lies, and of what thing, or not. *Vide Droit, (B 1, 2.)*

And if the lord refuses to hold a court, or to receive the writ, or to do right, a writ may be sued against him by the demandant to command him so to do. *F. N. B. 3. E.*

And hereupon he may have an *alias pluries*, and attachment. *F. N. B. 3. E.*

Or, demandant may remove the plea out of the court-baron by *tolt* to the county, and by *pone* from the county to *C. B.* without cause alleged. *F. N. B. 3. F.*

So, the tenant, with cause, may remove it by *recordari*. *F. N. B. 4. A.*

But

But if a court-baron holds plea of freehold without writ, the judgment and execution thereupon shall be void, and he who enters upon such execution will be a disseisor. *Kit. 74. b.*

And by the *st. de Marl. 52 H. 3. 22. nullus possit distringere liberos tenentes ad respondend. de libero tenement. aut de aliquibus ad liberum tenementum spectan. sine brevi domini regis.*

So, the lord after, or before a writ directed to him, may give a licence to his tenant to sue a writ of right in *C. B.*, whereupon he shall have right *quia dominus remisit curiam. F. N. B. 2. F. Vide Droit, (B 1.—C 2.)*

Or, if such clause be omitted, the lord may certify his assent by letter to the king in *Chancery. F. N. B. 3. A.*

Or, if the tenant sues in *C. B.* without such letter or clause, and recovers, it shall be good, and the lord or tenant cannot avoid it. *F. N. B. 3. B.*

So, if a writ of *right patent* be sued in a court-baron, and the *mise* joined upon *battail*, or to be tried by the grand assize, the court cannot proceed. *F. N. B. 4. E.*

Or, if a foreign plea be pleaded. *F. N. B. 4. E.*

If the court-baron proceeds after a foreign plea pleaded, or the *mise* joined upon the grand assize, a prohibition goes. *F. N. B. 4. E.*

(R 16.) *Copyhold.*] So, a copyholder shall implead, or be impleaded for his tenements, by plaint in the nature of a real action in the court-baron; for he cannot implead by the king's writ. *Lit. S. 76.*

And therefore, he may make plaint *de placito terre*, with protestation to sue in the nature of a *formedon, mort d'ancestor, assize, &c. Ibid.*

Or, in nature of a writ of entry *in the post*; and shall proceed thereupon as in such action at common law. *Mo. 68.*

The form of proceeding in *right patent*, *vide in Droit, (B 1, &c.)*

(R 17.) Trial.

In a court-baron all pleas of common right ought to be determined by wager of law. *2 Inst. 143. Vide County, (C 11.)*

But by prescription, a trial may be by jury. *2 Inst. 143.*

Or, *ex assensu partium. Bro. Trial, 143.*

(R 18.) Execution.

(R 18.) *In personal actions.*] If a recovery be in the court of the manor in a personal action, the plaintiff shall not have execution by *capias ad satisfaciendum*; for that does not lie in a court-baron. *Kit. 115. b.*

Nor, by *elegit*; for that was given by the *st. W. 2. 18. Vide Kit. 115. b.*

Nor, regularly by *fieri facias*, or *levari facias. Vide Kit. 115. b.*

But the plaintiff upon a precept from the steward, regularly, ought to distrain the goods of the defendant, and hold them in the nature of a distress, till he satisfies the condemnation. *1 Sal. 221. Vide Kit. 115. b.*

And he cannot sell the distress, tho' it be the king's manor. *R. 2 Cro. 255.*

Or, by custom, he may take execution by *levari facias*, and appraise the goods, and sell them. *Kit. 115. b. Lut. 1413. 1 Sal. 201.*

Or, the lord may prescribe to sell the goods, upon an execution. *Noy, 20.*

(R. 19.) *In real.*] So, in an action for copyhold land, pursued in the nature of a real action at common law, execution shall be by precept from the steward to the bailiff to deliver seisin. *Kit. 254. b.*

But C. B. will not aid a court-baron, with process to put the party into possession with a *posse manerii*. *R. 3 Leo. 9.*

So, if a judgment there be removed by *certiorari* to B. R., execution shall not be awarded thence. *R. 1 Lev. 134.*

How error shall be redressed, *vide ante*, (P 1, 2.)

(S) Custom ; The Nature of it.

(S 1.) Must be alleged in a particular Place.

WHAT a copyholder may, or ought to do, or not, the custom of the manor directs. *Co. L. 63. a.*

Every custom is local, and shall be alleged not in the person, as a prescription, but in the manor, or other place. *Co. L. 113. b.*

And it is *lex loci* ; for in such a particular place it binds the persons, or things concerned, as another law. *Dav. 31. b.*

Custom may be alleged in a manor, or other particular place. *Co. L. 113. b.*

In a city, or burrough. *Kit. 105. a.*

In a vill, not burrough or corporate. *Ibid.*

So, in a county ; as *gavelkind*. *Ibid.*

In a hundred, or county ; as the *Weld of Kent*, &c.

But it cannot be alleged for the whole kingdom ; for that is the common law. *Kit. 105. a.*

(S 2.) Must be Time out of Mind.

To every custom there are two inseparable incidents, time, and usage. *Co. L. 113. b. Vide Prescription, (E 1.)*

And therefore, continual usage, and practice, from time whereof no memory is to the contrary, makes a custom. *Dav. 32. a.*

[And "ancient" custom, found in a special verdict, means "immemorial" custom. *Corup. 17.*]

But a custom cannot be established by the king's grant. *Ibid.*

Nor, by act of parliament. *Ibid.*

(S 3.) Must be reasonable.

(S 3.) *What shall be so.*] Every custom, that is not contrary to reason, may be allowed. *Co. L. 62. a. Vide Prescription, (E 4.)*

(S 4.) *Tho' contrary to a rule of law.*] A custom may be reasonable, tho' it be contrary to a rule, or maxim of law. *Dav. 32. a.*

As, the custom of *gavelkind*, that all the sons shall inherit. *Dav. 32. a. Lit. S. 210. Vide Gavelkind.*

Or, *Burrough English*, that the youngest son shall inherit. *Co. L. 140. b.*

Or,

Or, the youngest son, if he be not of the half blood. *Co. L. 140. b.*

Or, the eldest daughter, or sister, &c. *Co. L. 140. b. Vide ante, (K 4.) Vide Burrough English.*

So, a custom, that a feoffment by tenant in tail with warranty, shall not make a discontinuance. *Dav. 30. a. 1 Rol. 562. l. 47.*

That the wife shall not have dower, where she receives money upon sale of the land. *Dav. 30. b. 1 Rol. 562. l. 50.*

That a widow, if she marries, shall not have dower. *1 Rol. 562. l. 52.*

That a lease for years, by a copyholder, shall determine with his life. *R. Hut. 101.*

That an infant, at the age of fifteen, may make a feoffment. *1 Rol. 567. K.*

That he may bind himself apprentice. *1 Rol. 567. l. 12.*

(S 5.) *Tho' contrary to a statute.]* So, a custom may be reasonable, tho' there be a general provision by statute to the contrary, if the custom is not expressly taken away; as, a custom that a tenant within the *Cinque Ports* shall not be in ward. *Dy. 288, 289. Pal. 543.*

Vide Prescription, (F 3.)

(S 6.) *If for a common benefit, tho' it tends to a particular prejudice.]* So, a custom shall be reasonable, if it be for the common benefit, tho' it tends to the prejudice of a particular person. *Dav. 32. b.*

As, a custom to make a bulwark for the defence of the realm, upon the land of another. *Ibid.*

Or to dry his nets upon the land of another. *Ibid.*

So, to turn his plow upon the headland of another; for it is for the benefit of agriculture. *Dav. 30. a. 32. b.*

So, that a searcher shall destroy all corrupt victual, which shall be put to sale within a manor. *Per three J. North dub. 1 Mod. 202. 2 Mod. 56.*

[So, a custom to elect such a one *resiant* within a private leet, within a hundred, constable of the hundred, is good, though he be also liable to serve that office within the leet. *Cowp. 13.]*

(S 7.) *If it may have had a reasonable commencement.]* So, a custom shall be reasonable, which may have had a reasonable commencement, tho' otherwise it would be unreasonable. *Vide post. (S 10.)*

As, a custom, that every tenant of a manor shall pay 3*l.* for a pound-breach, tho' it would not be good for a stranger; for the lord may give his tenements upon such terms. *Kit. 104. b. Vide post. (S 13.)*

That every tenant, who holds land in *villenage*, shall pay a fine upon the marriage of his daughter. *Kit. 104. b. Co. L. 140. a.*

That one shall have liberty to plow, and sow, and after the corn is carried away, another shall have the land as his several. *Kit. 104. b.*

That a commoner shall not put cattle upon the common, after the corn is carried away, till *Michaelmas*. *Kit. 105. a.*

That every ship shall pay so much *per ton* of all merchandise, in such an haven. *1 Sid. 18.*

[So, where a corporation is entitled to customary duty on corn imported, a custom that factors free of the corporation, shall receive to

to their own use, that part of the duty which arises from corn consigned to them as factors, is good; for it may have had a reasonable commencement, as to encourage the importation of corn, or to encourage factors to take their freedom. *Doug.* 119. 134.]

[A custom may be good, tho' it tends to diminish the value of the lord's estate. *Fawcett v. Lowther*, T. 1751, 2 *Vezey*, 300.]

(S 8.) *Tho' the right of another be restrained.*] So, a custom may be reasonable, tho' the right of another be restrained: as, a custom in restraint of trade in some respects. *Vide Trade*, (D 2.)

A custom, that a lord may have a bakehouse for his tenants in the vill, and that none else shall bake there to sell. *R. 1 Rol.* 559. l. 20. That all the inhabitants of a vill shall grind the grain they use there, at his mill. *R. 1 Rol.* 559. l. 40. [*Doug.* 218. 225.]

[But a custom to grind all corn, grain, or malt, which a man shall have occasion to use or spend, at the mill of A., is unreasonable; for it may extend to corn for horses, and at whatever distance the tenant may live. *Ld. Uxbridge v. Staveland*, M. 1747, 1 *Vezey*, 56. *Doug.* 221.]

[A custom for all those who have any land in a common field to inclose as much thereof as they please, is good. *Barber v. Dixon*, H. 17 G. 2. *Willf.* 44.]

(S 9.) *If in general words.*] So, a custom in general words ought to have a reasonable construction; as, to distrain all things upon the land, shall be intended of all things distrainable. 1 *Sid.* 18.

(S 10.) *What is not reasonable. If it cannot have had a reasonable commencement.*] But a custom is not reasonable, which cannot have had a reasonable commencement. *Dav.* 32. a. *Vide ante*, (S 7.)

For a custom need not have a lawful commencement, as a prescription, but ought to be reasonable in its commencement. 6 Co. 60. b.

And therefore, the custom of *tanistry* in Ireland, that land shall go *seniori & dignissimo* of the blood and surname, is unreasonable; for it commenced by power of the most potent. *R. Dav.* 34. b.

(S 11.) *If contrary to the law of God.*] So, a custom, contrary to the law of God, is not reasonable. *Vide Kit.* 105. a.

(S 12.) *Or, contrary to the king's prerogative.*] Nor, a custom, contrary to the king's prerogative; for *nullum tempus occurrit regi.* *Dav.* 33. b. *Vide Prescription*, (F 1.)

As, a custom to make a corporation. *Dav.* 33. b.

So, a custom, that goods distrained within a manor for the king's debt, shall be brought to the lord's pound for three days, and if the debt in that time be paid, they shall be restored. 1 *Rol.* 566. l. 30.

So, a custom to retain goods pledged till the money lent be satisfied, does not extend to the jewels of the crown. *Dav.* 33. b.

So, if a man has wreck, estrays, toll, &c. it does not extend to the goods of the king. 1 *Rol.* 566. l. 37.

(S 13.) *If it be to a general prejudice, for the advantage of a particular person.*] Nor, a custom to the general prejudice, for the advantage of any particular person. *Dav.* 33. a. As,

As, a custom, that no commoner shall put his cattle on the common till the lord has put his cattle there. *Dav. 32. b.*

That no tenant shall marry his daughter, till he pays a fine to the lord. *Dav. 33. a. Lit. S. 209.*

That the lord shall take the cattle of a stranger *levant* and *couchant* upon the land, for his heriot. *Dav. 33. a. Vide ante, (K 25.)*

Or, shall take 3*l.* of every stranger for a pound-breach. *Dav. Vide 33. a. ante, (S 7.)*

That a tenant shall be amerced, if he does not put his cattle in the lord's pound. *Dav. 33. a. R. 21 H. 7. 20.*

That a man, who does not pay as much as is due to the church, shall forfeit so much to the lord of the same vill. *21 H. 7. 20.*

That a tenant fishing in the sea near his land, unless in the lord's boat, shall pay so much to the lord. *Vide 21 H. 7. 20.*

(S 14.) *Or, to the prejudice of any, where there is not an equal prejudice or advantage to others.]* Nor, a custom to the prejudice of any one, where there is not an equal prejudice or advantage to others, in the same case; as, that the sheep of several owners, upon the same tenement, shall be counted *insimul*, and decimated; for one may pay all his lambs for tithes, and another nothing. *R. Hob. 329.*

(S 15.) *If the custom be, that any one shall be judge for himself.]* Nor, a custom, that any one shall be judge for himself; as, that the lord shall detain a distress taken upon his demesnes, till fine made for the damage, at his will. *Dav. 33. a. Lit. S. 212.*

(S 16.) *If it be against common right.]* Nor a custom against common right; as, that a man shall have warren in land not held of him. *Kit. 104. b.*

That every tenant of the manor shall impound cattle in the lord's pound, for he may impound upon his own land. *Kit. 105. b.*

That if a tenant ceases for two years, the lord shall enter till he agrees for the arrears; for the tenant will be ousted of his inheritance without action. *1 Rol. 559. l. 50.*

That a *feme-covert* may make a devise of her lands. *1 Sid. 17.*

[Or, that *feme-covert* seised in fee of copyhold lands may dispose of her estate without her husband's joining. *Stevens v. Tyrrel, H. 26 G. 2. 2 Wilf. 1.]*

Or, that tenant in fee shall not devise his lands in such a vill. *1 Rol. 558. l. 15.*

Or, shall not lease for above six years. *Ibid.*

That the wife of a tenant in fee shall not be endowed *1 Rol. 563. l. 1.*

That the wife shall have property of such a part of the goods during coverture, and shall dispose of them without her husband. *1 Rol. 563. l. 5. 609. l. 38.*

That every freeholder shall pay a fine to the lord, upon the marriage of his daughter without licence. *Co. L. 139, 140.*

(S 17.) *Or, against a prescriptive right.]* Nor, a custom against a right by prescription; as, that any one may erect upon a new foundation, to the obstruction of ancient lights. *R. 1 Rol. 558. l. 50. 566. l. 5.*

So, if a man prescribe for a way, a custom that another may stop it up, is void. *1 Rol. 566. l. 20.*

So, if he prescribe for common appendant or appurtenant, a custom that another may inclose, is void. *R. 1 Rol. 565. l. 50. Jon. 375. Cra. Car. 432.*

(S 18.) *If it imports a loss on one side, without a benefit in consideration.* So, a custom is not reasonable, which imports a loss on one side, without a benefit in consideration; as, that a lord of a manor shall have the best anchor and cable of every ship that strikes upon soil within his manor, and perishes there, tho' it be not a wreck. *R. 3 Lev. 85. Vide 3 Lev. 307.*

Tho' it be alleged, that the lord buries the dead cast from the ship; for that is a matter of charity. *3 Lev. 307. (In 3 Lev. 307, 8, seems to be adjudged a good custom.)*

So, a custom, that every ship which passes the river shall pay such a sum, because the city, &c. maintains a key for all goods unladen in the same city; for this does not extend to ships which do not unlade there. *R. 1 Vent. 71. 1 Mod. 47.*

Or, because it maintains a key, and bushel for measuring of all goods. *R. 2 Lev. 97. Ray. 232. 1 Mod. 104.*

Tho' the goods are unladen at another place in the same river. *2 Lev. 97.*

[So, a custom to sink coal-pits, and lay the rubbish, coal, wood, &c. near the mouth, on the land of another, at the will of the lord, is void; as unreasonable, uncertain, and tending to make a man judge in his own cause. Determined in *C. B.* and affirmed unanimously on error in *B. R. Wilkes v. Broadbent, P. 17 G. 2. Wilf. 63. Str. 1224.*]

(S 19.) Must be certain.

So, a custom ought to be certain, otherwise it shall be void. *Dav. 33. a. Vide Prescription, (E 3.)*

As a custom, that an infant may make a feoffment, when he is of age, to count 12d. or measure an ell of cloth. *Dav. 33. a.*

That the tenant of a manor, shall have all windfalls, who first comes to the place where they fell. *Dav. 33. a. But. Dav. 35. Semb. cent.*

That land shall descend *seniori & dignissimo* of the blood and surname. *R. Dav. 35.*

[So, a custom that the grantee of a customary estate, (which will pass either by surrender or deed and admittance,) must be admitted during the life of the grantor, is good in law. *Fenn v. Mariott, C. P. M. 17 Geo. 2. Willes, 430.*]

So, a custom that depends upon the will or pleasure of another, is uncertain and void: as, to have half a mark, or a horse, when the sheriff hold his tourn. *Dav. 33. a.*

That a lease by a copyholder for a year, shall determine by a surrender of the copyholder into the hands of the lord. *Hut. 101.*

[So, a custom for poor indigent householders living in *A.* to cut, and carry away the rotten boughs and branches in a chase in *A.* cannot be supported, the description of the persons entitled being too vague. *2 Term Rep. 758.*]

(S 20.)

(S 20.) Custom, how destroyed.

If a custom be discontinued, it is gone. *Dav.* 33. *b.*

C O R N.

Vide Dismes, (H 1.) — *Biens*, (G 1, 2.)

C O R O N A T I O N.

Vide Roy (C).

Claims at a Coronation.

Vide Officer, (E 6.)

C O R O N E R.

Vide Justices of Peace, (D 7.) — *London*, (K 6.) — *Officer*, (G. 1, &c.)

C O R P O R A T I O N.

Vide Franchises, (F 1, &c. — G 4, &c.) — *Capacity*. — *Devise*, (H 5, 6.)
— *Discontinuance*, (A 1.) — *London* (H). — *Pleader*, (2 B 1, 2.)

C O R R E C T I O N.

Vide Leet (K). — *Pleader*, (3 M 19.)

House of Correction.

Vide Justices of Peace, (B 82.) — *Uses*, (N 9.)

C O S I N A G E.

Vide Assise (D).

C O S T S.

(A) When Costs shall be recovered.

(A 1.) By Demandant, or Plaintiff.

[I T is a certain principle that the king himself neither pays, nor receives, costs in any case. *Per Lord Mansfield C. J. Wilkinson v. Allot*, B. R. M. 16 Geo. 3. *Cowp.* 367.]

By the common law costs were not recoverable in a plea real, personal, or mixt. 2 *Inst.* 288. 10 *Co.* 116. *a.*

But now, by the *st. of Glouc.* 6 *Ed.* 1. 1. the demandant may recover the costs of his writ, in all cases where he may recover damages.

And this extends to all the costs expended in the suit. 2 *Inst.* 288.

And to costs upon the first writ, where the plaintiff purchases another by *journeys accompts.* *Ibid.*

But he shall not have allowance for his trouble, or loss of time. *Ibid.*

And

And the *st. of Gloc. 6 Ed. 1. 1.* gives costs, in all cases where damages are recoverable by the same or any former act. *10 Co. 116. a.*

So, where any subsequent act gives damages, in a case where damages were recoverable before. *1 id. [Coup. 368.]*

So, where a subsequent statute *de novo* gives a certain penalty and an action for it to the party grieved, he shall have costs; otherwise he might lose by the prosecution: as, in an action upon the *st. 1 Ph. & M. 12.* for taking more than *4d.* for a distress, by which he loses *5l.* *R. Cro. Car. 560. 1 Rol. 516. l. 50. Jon. 447. 1 Vent. 133. Mar. 56.*

[So, in an action by the party grieved against the sheriff upon the *stat. 23 Hen. 6. c. 9.* for not taking bail. *Cresswell v. Hoghton, B. R. T. 35 Geo. 3. 6 T. R. 355.*]

[So also, a prisoner suing as a party grieved on the *habeas corpus act*, for refusing a copy of his warrant of commitment. *Ward v. Snell, C. P. E. 28 Geo. 3. 1 H. Bl. 10.*]

[So, also a plaintiff who recovers treble damages in an action on *29 Eliz. c. 4.* against the sheriff for taking more than the fees allowed by that statute on levying under an execution against the plaintiff's goods. *Tyte v. Glode, B. R. E. 37 Geo. 3. 7 T. R. 267.*]

[Where a penalty is given by a statute, (even subsequent to the statute of *Glocester*,) to the party grieved, he is entitled to costs if he succeed; and if he be nonsuit, or a verdict pass against him, he is liable to pay costs to the defendant either under the *stat. 23 Hen. 8. c. 15.* or *stat. 4 Jac. 1. c. 3.* which gives costs to defendants in all cases where the plaintiff is entitled to costs if he succeed. *Plymouth v. Werring, C. P. H. 17 Geo. 2. Willes, 440.*]

In an action upon the *st. 21 H. 8. 6.* which gives *40s.* for taking a mortuary not due. *1 Rol. 516. l. 35. Co. Ent. 164. Lut. 200.*

Upon the *st. 5 El. 9.* which gives *10l.* against a witness who does not appear upon a *subpoena.* *R. 1 Sal. 206.*

So, upon the *st. 13 El. 5.* which gives only a moiety of the penalty to the party grieved, for using a fraudulent deed. *Co. Ent. 163. Lut. 200. 1 Rol. 517. l. 10.*

So, where by a private act a penalty is given to the party grieved, the plaintiff shall have costs; for it is a duty vested before the action brought. *R. Skin. 363. 367.*

So, in an attachment upon a prohibition, the plaintiff shall have costs, if the defendant be found guilty. *1 Rol. 516. l. 30. R. 3 Lev. 360. 2 Inst. 644.*

So, if judgment be by default, and damages found upon a writ of inquiry. *R. 2 Jon. 128. Ray. 387. 1 Vent. 348. 350.*

[If on a writ of inquiry damages are given separately, and *pro missis & custagiis 20s.* then plaintiff releases the damages as to two counts, and has judgment for the residue, with costs *de incremento*, it is well; for if defendant has been at expence as to the bad count, the court can make him an allowance in the costs *de incremento.* *Cutler v. Goodwin, P. 7 G. Str. 420.*]

And in prohibition, if the verdict be, that the defendant proceeded after a prohibition delivered. *1 Rol. 516. l. 25. R. Cro. Car. 559. Jon. 447.*

And now, by the *st. 8 & 9 W. 3. 11.* in all suits upon prohibition, if the plaintiff has judgment after plea, or demurrer.

[If

[If plaintiff in prohibition prevails in any part, he shall have costs. *Middleton v. Croft*, M. 10 G. 2. Str. 1056. B. R. H. 395. Andr. 57.]

[If husband and wife are plaintiffs in prohibition, and husband dies before judgment, yet the wife shall have costs; for either the suit is not abated at common law, or it is helped by *ft. 8 & 9 W. 3. c. 11. Ibid.*]

[After judgment for plaintiff in prohibition, costs shall be allowed from the first motion. *Houghton v. Starkey*, in *sc. H. 4 G. Str. 82. Fort. 348.*]

[In prohibition, costs commence from the suggestion; and there shall be costs of a feigned issue directed to try a fact for the information of the court. *Barnes*, 130.]

[If defendant in prohibition forces plaintiff to declare, and pleads nugatory plea, (as that he had not proceeded in spiritual court after prohibition,) court will on motion give costs; but this is not within *8 & 9 W. 3. c. 11. Barnes*, 148.]

So, the plaintiff shall have costs, in debt for costs assessed for not proving a suggestion. *R. 1 Rol. 516. l. 40.*

And now by the *ft. 8 & 9 W. 3. 11.* in debt upon the *ft. 2 Ed. 6. 13.* for not setting out his tithes, where the single value found by the jury does not exceed twenty nobles.

[But none, if above. *Barnes*, 150.]

And by the same statute, in all actions for waste, where the single value found does not exceed twenty nobles.

And by the same statute, the plaintiff shall have costs in a *scire facias*, if he obtains an award of execution after plea or demurrer.

In a *scire facias* upon a recognizance by bail. *Semb. 1 Sal. 208.* [This statute does not extend to a *scire facias* to repeal a patent prosecuted in the name of the king. *Rex v. Miles*, T. 37 Geo. 3. 7 T. R. 367.]

[Equitable costs may be levied out of the penalty of a bond, but not out of the penalty of a recognizance of bail. *Baldwin v. Morgan*, H. 2 G. 2. Str. 826.]

So, the plaintiff shall have costs, if he has judgment upon demurrer, where he would have had them upon a verdict.

And in an action against an executor, or administrator. *Hut. 79. D. Hard. 165.*

So, where several damages are given, he shall have entire costs, tho' he has judgment only for part. *Hob. 6.*

By the *ft. 33 H. 8. 39.* in suits upon specialty to the king, or to another to his use, the king shall recover his costs and damages as other common persons do in their suits.

[In an action on the riot-act, 1 G. 1. c. 5. for pulling down the plaintiff's houses, brought against the inhabitants of the hundred, and in an action of hue and cry, full costs. *Witham v. Hill*, P. 32 G. 2. 2 Wilf. 91. *Barnes*, 151. *Ratcliffe v. Eden*, B. R. M. 17 Geo. 3. Cowp. 485.]

[So, in an action for a false return by a member of parliament. Cowp. 487.]

[On recognizance forfeited, and money levied, the court will order prosecutors costs to be paid, and the surplus returned. *R. v. Eyres*, T. 7 G. 3. 4 B. M. 2118.]

[If defendant does not go on to trial by proviso, according to notice. *Wilkinson v. Poole*, P. 1 G. 2. Str. 797.] [On

[On trial of a feigned issue by direction of a court of law, costs follow the verdict, and the court has no discretionary power; but when issue is directed by Chancery, costs are not given by this court, but left to Chancery. *Herbert v. Williamson*, P. 25 G. 2. 1 *Wils.* 324.]

[The court, however, may refuse to permit the parties to try a feigned issue, unless they will consent that the costs shall be in the discretion of the court. *Hoskins v. Berkeley*, B. R. M. 32 Geo. 3. 4 T. R. 402.]

[Where a party applies for a trial at bar, the court may lay the party applying under the terms of receiving *nisi prius* costs, and paying bar-costs. *Homes v. Brown*, B. R. T. 20 Geo. 3. *Dougl.* 437.]

[If there are three feigned issues, and one only found for plaintiff, he must have costs, though the most material is found against him. *Tempest v. Medcalf*, T. 25 & 26 G. 2. 1 *Wils.* 331.]

[If on motion for *quo warranto* information, it is agreed to try the corporation-right by a feigned issue, in which the prosecutor as plaintiff prevails, he shall have costs only from the time when the feigned issue was first agreed to and ordered, (which includes the costs of the disputes about settling the feigned issue, in which dispute plaintiff prevails,) but not costs antecedent to such consent. *Thomas v. Powell*, P. 31 G. 2. 1 B. M. 603.]

[If defendant has leave to amend plea on payment of costs, and the amendment does not deface the record, and the replication is not *de novo*, but only altered so as to pursue the alterations in the plea; costs on the plea and replication shall not be as if new, but only in proportion to the alterations made, and also for consulting counsel if replication *de novo* is necessary. *Rex v. Philips*, H. 32 G. 2. 2 B. M. 757.]

[If two actions are brought by the same plaintiff at the same time, for causes which may be joined, and the defendant is holden to bail in both, the court will compel the plaintiff to consolidate them, and to pay the costs of the application. *Cecil v. Briggess*, B. R. T. 28 Geo. 3. 2 T. R. 639.]

[A rule attempting to subvert the established practice of the court, will be set aside with costs. *Yeardley v. Roe*, B. R. H. 30 Geo. 3. 3 T. R. 573.]

[To a declaration of two counts, if defendant demurs to the one, and has judgment for him, and pleads to the other, and verdict against him; plaintiff shall have costs on the verdict, but defendant none on the demurrer. *Astley v. Young*, T. G. 3. 2 B. M. 1232.]

[If there be two distinct causes of action in two counts, and as to one the defendant suffers judgment to go by default, and as to the other takes issue and obtains a verdict, he is entitled to judgment for his costs on the latter count, notwithstanding the plaintiff is entitled to judgment, and his costs on the first count. *Day v. Hanks*, B. R. E. 30 Geo. 3. 3 T. R. 654.]

[If a plaintiff have a verdict on one count only, costs shall be taxed on the whole declaration, though there be a verdict for defendant on the others. 2 *Bl. Rep.* 800. 1199.]

[And defendant shall not have costs on that part of the record, on which a verdict is found for him. *Doug.* 678. *Vide post.* (A 5.)

[By *stat. 4, 5 Ann. c. 16.* which enables a defendant to plead several matters, it is enacted, that if any such matter shall upon a demurrer
joined,

joined, be judged *insufficient*, costs shall be given at the *discretion* of the court; or, if a verdict shall be found on any issue in the said cause for the plaintiff or demandant, costs shall be also given *in like manner*, unless the judge who tried the said issue, shall certify that the said defendant, or tenant, or plaintiff in replevin had a probable cause to plead such matter which on the said issue shall be found against him.]

[On this statute, the *quantum* only of the costs is left to the discretion of the court. 2 *Term Rep.* 394, 5.]

[Therefore, if one of several pleas pleaded by defendant be adjudged bad, on demurrer, whether to the plea directly or to plaintiff's replication, the plaintiff is entitled to have the costs of those pleadings deducted from the costs taxed for the defendant on the *poslea*, if afterwards on trial of the issues joined on the other pleas, defendant should have a verdict; even though it should appear, on the whole of the record, that the plaintiff had no cause of action. 2 *Term Rep.* 391.]

[But if instead of demurring to a bad plea, the plaintiff take issue on it, he shall not have the costs of that plea, if the defendant have a verdict on it, though plaintiff have a verdict on all the other pleas. 1 *Term Rep.* 266.]

[Where any one of several issues in a *quo warranto* information is found for the prosecutor, on which judgment of *ouster* is given, he is entitled to costs on all the issues. 1 *Term Rep.* 453.]

[Defendant pleads several pleas; demurrer to some, and judgment for plaintiff; issue on others, plaintiff nonsuited; plaintiff has costs for the demurrers, according to 4 *Ann*, out of which are to be deducted costs of nonsuit. *Barnes*, 136. 140, 141.]

[If lessor of plaintiff dies after trial, costs shall be paid to his representative. *Barnes*, 119.]

[If one defendant in ejectment confesses lease, &c. and there is judgment against him for a third, and another does not confess, the court will make a rule against him for costs. *Barnes*, 121. 149.]

[Costs in one cause may be set against costs in another, if between the same parties; otherwise not. *Barnes*, 130. 145, 146.]

[If although plea confesses trespass, plaintiff replies, and the cause is tried, and verdict for defendant; yet the court will give judgment for plaintiff, and inquiry and costs for all proceedings but the trial. *Barnes*, 133.]

[In *C. B.* costs of a former assize, when cause made a *remanet*, not allowed, unless by consent expressed in the rule. In *B. R.* otherwise. *Barnes*, 150. 153.]

[Costs of a *remanet*, where neither side are in fault, attend the event of the cause generally, but on circumstances otherwise, but the application must be recent. *Sadler v. Evans*, *M. 7 G. 3.* 4 *B. M.* 1984.]

[An inclosure-act directed that the parties who were dissatisfied with the determination of the commissioners might bring actions to try their rights, adding, "that if the verdict should be in favour of the commissioners' determination the costs should be borne by the plaintiff, and if against such determination, then by the proprietors at large." A proprietor brought an action, claiming nine distinct rights, and recovered for three only; and it was holden that he should have his costs on those issues alone found for him, and that the de-

defendant should have his costs of the other issues. *Braithwaite v. Bradford*, B. R. E. 36 Geo. 3. 6 T. R. 599.]

[In C. P. if the plaintiff succeed on only one count in his declaration, he has his costs on all; but in B. R. he does not receive costs on any count on which he does not succeed, though he does not pay them. *Per Lawrence Just. Ibid.*]

[It is ordered, that in all cases where a rule is obtained to shew cause why proceedings should not be set aside for irregularity with costs, and such rule is afterwards discharged generally, without any special direction on the matter of costs, it is understood to be discharged with costs; and the latter rule must be drawn up accordingly. *Reg. Gen. B. R. M.* 37 Geo. 3. 7 T. R. 82.]

(A 2.) *When a plaintiff shall not recover costs.*] But the plaintiff shall not have costs, where a statute since (a) the *st. of Gloucester* gives damages generally, in a case where no damages at all were recoverable before: as, in *quare impedit*, 10 Co. 116. a. *Barnes*, 139. cont.; where the church was full at the time of the *quare impedit*. *Skin.* 25. [*Corup.* 368.] *Vide post.* (D).

So, a plaintiff, who sues *qui tam*, &c. shall not have costs, be the penalty certain or uncertain. *R. 1 Vent.* 133. *1 Sal.* 206.

As, upon the *st.* 31 *El.* 12. for not paying toll for a horse before sale. 3 *Lev.* 374. *Lut.* 200.

Upon the *st.* 5 *El.* 9. for 20 l. against him who commits perjury. *R. Hutt.* 22. *1 Brown.* 66. *Dub. Cro. El.* 177.

[The prosecutor in a *noctanter* shall not have costs. *Rex v. Glasfenby*, H. 10 G 2. *Str.* 1069, *B. R. H.* 355.]

So, the plaintiff shall not have costs against the garnishee in a foreign attachment. *R. Cro. El.* 172.

Nor in a *scire facias*, till the *st.* 8 & 9 *W.* 3. 11. *Latch*, 101. *Dal.* 95.

[If plaintiff does not file an affidavit used before the prothonotary to augment costs, C. B. will set the judgment aside. *Boseville v. —*, T. 11 & 12 G. 2. *Barnes*, 126.]

[The security shall pay neither costs nor interest in a recognizance forfeited which was given on a plea to an extent. *Rex v. Albert*, P. 1716, in *Sc. B.* 4.]

[On a repleader, no costs to either party for the immaterial pleadings. *Barnes*, *125.]

[Defendant in replevin moves to amend avowry on paying costs, his agent pays them after his death; they shall be returned. *Barnes*, 138.]

[Juror withdrawn, matter referred, award of costs to be taxed; the costs of the reference shall not be allowed. *Barnes*, 123. 58.]

(a) Note; But the practice has been to give costs on the statute of Hue and Cry, (13 Ed. 1. *st.* 2. c. 2.) which is subsequent to this statute. *Dist. 1 Term Rep.* 72. and lord Coke lays down a different rule. 2 *Inst.* 289, for he says, "This clause," (speaking of the statute of Gloucester,) "doth extend to give costs, where damages are given to any defendant or plaintiff by any statute made after this parliament." Therefore the court gave costs, on 9 G. 1. c. 22. which gives an action for setting fire to the plaintiff's house, and damages not exceeding 200l. though the damages given on the trial, together with the costs, exceeded the 200l. 1 *Term Rep.* 71, 72, 73.

But a similar decision on this very statute in 3 *Bur.* 1723, is said to have been given on erroneous grounds. *Corup.* 367, 368.

[If

[If the court orders a nonsuit, the plaintiff pays the defendant his costs. *Cameron v. Reynolds*, B. R. H. 16 Geo. 3. Cowp. 407.]

[Where the judgment is arrested, each party pays his own costs, *Ibid.*]

[So, where a juror is withdrawn, *Stodhart v. Johnson*, B. R. E. 30 Geo. 3. 3 T. R. 657.]

[Administrator nonsuited in action for tithes accrued in intestate's life, or in *trover* when the conversion was in intestate's life, pays no costs; but if in his own time he does. *Barnes*, 127. 129. 132.]

[They are liable to costs in no action which they cannot bring in their own right. *Barnes*, 141.]

[Nor if nonsuited, on 14 G. 2. for not proceeding to trial. *Barnes*, 133. *Howard v. Rathbone*, C. P. H. 15 Geo. 2. *Willes*, 316. *Booth v. Holt*, C. P. H. 34 Geo. 3. 2 H. Bl. 277.]

[But he cannot discontinue without payment of costs. *Barnes*, 169. *Vide 3 Burr.* 1584. 4 *Burr.* 1927. *Vide infra*, (A 5).]

[Especially if he had acted wrong within his own knowledge, as where an executor brought an action in his own name, knowing that there were other executors. 1 *Bl. Rep.* 451. 3 *Burr.* 1451. S. C.]

[Where the defendant pleads the general plea of bankruptcy, to an action brought by an executor or administrator, and obtains a verdict, the plaintiff is not liable to costs under the *stat.* 5 Geo. 2. c. 39. s. 7. *Martin v. Norfolk*, C. P. M. 31 Geo. 3. 1 H. Bl. 528.]

[The plaintiff in an action for taking his ship or goods, shall not have costs, altho' the verdict be for him, if the judge or court certify, that there was probable cause of seizure as *contraband*. *Doug.* 106.]

[In taxing costs, the contingent losses which witnesses may have suffered by obeying the *subpoena* cannot be allowed. *The Russell v. Staples*, B. R. T. 20 Geo. 3. *Doug.* 438.]

(A 3. When no more cost than damages.) By the *st.* 43 El. 6. in personal actions in the courts of *Westminster*, (and by the *st.* 11 & 12 W. 3. 9. in the courts in *Wales*, *Chester*, *Lancaster*, and *Durham*,) if it appears that the debt or damages amount not to 40s. the plaintiff shall have no more costs than damages. [*Robinson v. Walker*, B. R. T. 18 & 19 Geo. 2. 1 *Wils.* 93. 2 *Str.* 1232. S. C. *Bartlet v. Robbins*, C. P. E. 5 Geo. 3. 2 *Wils.* 258. *Dand v. Sexton*, B. R. H. 29 Geo. 3. 3 T. R. 37.]

Nor by the *st.* 21 Jac. 16. in an action for slander, if the damages are under 40s.

Nor by the *st.* 22 & 23 Car. 2. c. 9. s. 149. in other personal actions, unless where the judge at the trial certifies a battery to be proved, or a title to be principally in question; and judgment for more costs shall be void. 1 *Vent.* 256.

If a statute says, that if the damages be under 40s. the plaintiff shall not have judgment, but the defendant shall have costs; the jury ought to find for the defendant in such case. 5 *Mod.* 367.

The plaintiff shall not have more costs than damages in trespass for assault and battery; if the defendant be found Not Guilty as to the battery. R. 2 *Lev.* 102.

And the plaintiff shall have no more costs than damages, tho' the plaintiff joins several trespasses, and the defendant justifies all, except the *clausum fregit*, if the justification be found for the defendant. R. 2 *Vent.* 180. 195.

Though the trespass be for breaking his close, and also putting stakes upon his soil. *R. 2 Vent.* 48.

Or, breaking his close and his soil. *Dub. 5 Mod.* 74. *R. Carth.* 224, 5.

Or, breaking his close, and cutting down corn. *Semb. 5 Mod.* 315. *Skin.* 666.

[Or, in trespass for breaking his close, and digging up the soil in the place in which, &c. and carrying away the same. *Doug.* 780.]

[Or, in trespass for an assault, battery, and tearing the plaintiff's clothes, if the jury find that the tearing was in consequence of the beating, and give less than 40s. damages. *1 Term Rep.* 655.]

[After a verdict for the plaintiff, with damages under 40s. on a count charging the defendant with assaulting the plaintiff, and then and there tearing the plaintiff's clothes, which the plaintiff then and there wore, the plaintiff is entitled to no more costs than damages. *Mears v. Greenaway*, *C. P. M.* 30 *Geo.* 3. *1 H. Bl.* 291. *Lockwood v. Stannard*, *B. R. H.* 34 *G.* 3. *5 T. R.* 482.]

[Or, for breaking and entering house, and keeping plaintiff out for a month, whereby he was put to expence to regain possession, and lost the use of it. *Blunt v. Mither*, in *C. B. M.* 12 *G.* *Str.* 645.]

[In trespass *vi & armis* for entering plaintiff's house; making noise, and continuing until plaintiff and others gave a note for money, not full costs. *Appleton v. Smith*, *H.* 2 *G.* 3. *3 B. M.* 1282.]

[Or, for breaking a door fixed to a house. *Barnes*, 121.]

[Or, for throwing stones at the windows belonging to plaintiff's dwelling-house, and for breaking the glass. *Adlem v. Grinaway*, *B. R. E.* 35 *Geo.* 3. *6 T. R.* 281.]

Or, breaking his close and cutting down his rails; for they are fixed to the freehold. *Per Holt*, *Com.* 324. *Anon. T.* 11 *G.* *Str.* 633.

Or, breaking his closes and pulling up and throwing down his hedges. *R. Comb.* 420.

In trespass, defendant guilty *quoad transgression. cum averiis & fen-surar. Fraction. prostration. & divulsion.*, and the judge had not certified; costs as damages. *Mitchel v. Soaper*, *P.* 1724, *Bunb.* 167.

Or, cutting down trees. *R.* 11 *G.* 1. *C. B. Shepherd and Yard.*

Nor, for trespass for assault and battery, and striking his horse, *per quod deterioratus fuit*, and Not Guilty, and damages generally, where no battery was certified. *R. Pas.* 11 *Geo.* in *B. R. inter Clerk and Othery.* (1 *Str.* 624.)

[In trespass for battery, imprisonment, breaking house, &c. defendant justified the imprisonment, and Not Guilty to the rest; on trial, justification found for defendant, and the Not Guilty for plaintiff, and 2s. 6d. damages: not full costs for the battery, for the judge had not certified; nor for the breaking, &c. as it related to the freehold. *Beck v. Nichols*, *M.* 10 *G.* *Str.* 577.]

Nor, though an action for slander was commenced before the 21 *Jac.* if it was prosecuted after. *R. Latch*, 2. 58.

Or, commenced in an inferior court, and removed into *C. B.* by *habeas corpus*. *R. in C. B.* *T. R.* 12 *Ann.*

[Yet if special damage is alleged and put in issue, which would have been a distinct cause of action, plaintiff shall have full costs. *Anderson v. Buckton*, *T.* 5 *G.* *Str.* 192.]

But

But the *ft.* 21 *Jac.* 16. does not extend to an action for slander of a title. *Per three J. Jon.* 196. 1 *Sal.* 207. *Cro. Car.* 141.

Nor, to an action for words, actionable only in respect of special damage. *R.* 1 *Sal.* 206.

Nor, for words and procuring to be indicted. *R. Cro. Car.* 163. 307. *R. cont.* 2 *Mod. Ca.* 371.

[In action for words, whereby he was not only damaged in his goods, name, &c. but also by occasion of the words, by the procurement of defendant he was taken up, and carried before a justice; full costs. *Carter v. Fish, M.* 12 *G. Str.* 645.]

[*Case*, for saying to a single woman—"You are a common street-walking bitch, and stand every night at the corners of streets to be picked up by fellows;" full costs; for the words in themselves are not actionable. *Bass v. Aickford, P.* 12 *G. 2. Andr.* 375.]

[But in *case* for words spoken of a tradesman, *per quod* he lost several customers; if the words themselves are actionable, no more costs than damages. *Burry v. Perry, Str.* 936. *Ld. Raym.* 1588. *Surman v. Shelleto, P.* 5 *G. 3.* 3 *B. M.* 1688. *Turner v. Horton, C. P. H.* 16 *Geo. 2. Willes,* 438. *Barnes,* 132. 135. 142.]

[For words, where no special damage proved, and damages under 40*s.* if full costs are taxed, and execution, it shall be set aside with costs. *Barnes,* 128.]

[Where in an action for slander, some of the counts in the declaration are for actionable words, and others for words not actionable, and special damage is laid referring to all the counts, and the plaintiff has a verdict on the whole declaration; though the damages recovered be less than 40*s.* he is entitled to full costs. *Savile v. Jardine, C. P. T.* 35 *Geo. 3.* 2 *H. Bl.* 531.]

And the *ft.* 22 & 23 *Car.* 2. does not extend, where the jury gives costs to a sum certain, more than the damages are. *R.* 2 *Vent.* 36. 1 *Sal.* 207.

Nor, to a trespass, in which the title of the land does not come in question: as, in trespass for throwing down his stalls in a market. *R. Ray.* 487. 2 *Jon.* 232.

[Nor, to a trespass in breaking *free warren*, for in such action, the title to the *soil* cannot come in question. 2 *Bl. Rep.* 1151, 1152.]

Nor, to trespass and trampling *struem*, *Anglicè*, a hay-rick. *Dub. F. g.* 42.

Or, killing his horse with a sword. *Ray.* 488.

Or, for entering his close and impounding his cattle. *R.* 3 *Mod.* 40.

Or, for entering his close and plowing his soil. 5 *Mod.* 74. 316.

Or, digging his turf, corn, &c. *Semb.* 1 *Sal.* 193.

Or, entering his boat, and cutting his rope. 5 *Mod.* 316. *R. Comb.* 324.

Nor, to a trespass with an *asportavit*, though the thing carried away be of small value. *R.* 2 *Vent.* 48. *Acc. Skin.* 666.

[Where the *asportavit* is coupled with the rest of the count, it is not to be considered as a distinct injury, but part of one trespass, and therefore not entitling plaintiff to full costs. *Clegg v. Molyneux, B. R. T.* 21 *Geo. 3. Dougl.* 780.]

[In trespass for assault, and taking a rope, if the judge certifies upon *stat.* 43 *Eliz. c.* 6. there shall be no more costs than damages;

tho' it is laid with an *asportavit*. *Walker v. Robinson*, T. 18 G. 2. 1 *Wils.* 93. *Str.* 1232.]

[In trespass for entering his house and eating his meat, specifying quantities and kinds, half-a-guinea damages, and full costs; for as to the goods, it is in the nature of *trover*. *Smith v. Clark*, P. 13 G. 2. *Str.* 1130.]

[On *asportavit*, or damage to personal chattel, or for tearing plaintiff's clothes; full costs. *Barnes*, 119, 120.]

So, if he enters a close, and digs roots, and removes them to another place in the same close; for that is a carrying away. *Per two J. Vent. cont.* 2 *Vent.* 215.

So, in trespass, *quod oves chasavit & abduxit*; for that is a carrying away. *Carth.* 225.

So, the *st.* 22 & 23 *Car.* 2. does not extend to a trespass where the defendant justifies, and it is found against him. *R.* 2 *Lev.* 234.

[Where a defendant, in an action of trespass, justifies to the whole declaration, and it is found against him, the plaintiff shall have full costs, though the judge do not certify. *Redridge v. Palmer*, C. P. *Mich.* 32 *Geo.* 3. 2 *H. Bl.* 2. *Piddell v. Kiddle*, B. R. E. 38 *Geo.* 3. 7 *T. R.* 659.]

[In an action for an assault and battery, the defendant pleaded the general issue, and a plea of justification to the *assault only*, the plaintiff obtained a verdict for 1 *s.* damages, and the court refused him more costs, because the justification did not go to the whole declaration, and the judge did not certify. *Page v. Creed*, B. R. *Trin.* 29 *Geo.* 3. 3 *T. R.* 391.]

[If to an action for an assault and battery, the defendant plead the general issue and a justification to the whole, and the plaintiff obtain a verdict with damages under 40 *s.* he is entitled to full costs. *Smith v. Edge*, B. R. H. 36 *Geo.* 3. 6 *T. R.* 562.]

[Where in an action of trespass *quare clausum fregit* a special plea is pleaded, and the issue found for the plaintiff, he is entitled to full costs, though the damages are under 40 *s.* and there is no certificate of the judge. *Comer v. Baker*, C. P. T. 34 *Geo.* 3. 2 *H. Bl.* 34.]

[To trespass for building a wall, and treading down the grass, defendant pleaded *Not Guilty*, and a way; and on verdict for plaintiff, he had full costs, tho' no certificate. *Higgins v. Jennings*, M. 13 G. *Str.* 726. *Ld. Raym.* 1444.]

[In trespass *quare clausum*, &c. and any thing laid for aggravation, there shall be no more costs than damages, tho' the freehold might come in question, unless the judge certifies; but if there are separate counts, and plaintiff have *entire* damages, he shall have full costs without certificate: if defendant is found guilty as to *clausum fregit* and not guilty *de bonis asportatis*, plaintiff shall have no more costs than damages. On consideration, *per cur.* *Reeves v. Butler*, H. 1725, *Bunb.* 207.]

[If in trespass defendant justifies for a way, and plaintiff replies *extra viam*, and obtains verdict, he shall have full costs, for the right comes in question. *Beale v. Moor*, T. 15 G. 2. *Str.* 1168.]

[The statute extends to an action for mesne profits. *Doe v. Davies*, B. R. H. 36 *Geo.* 3. 6 *T. R.* 593.]

[Where a declaration in trespass consists of one count only, the defendant

defendant justifies part of it, and the plaintiff now assigns without taking issue on the special plea, and obtains a verdict for 1 s. he is entitled to the costs of all the pleadings. *Gundry v. Sturt*, B. R. H. 27 Geo. 3. 1 T. R. 636.]

[Plaintiff shall not have full costs, tho' defendant pleaded a tender, if judge certifies under 43 *Eliz. Bartlet v. Robins*, P. 5 G. 3. 2 *Wilf.* 258.]

[On trespass, justification; on new assignment, Not Guilty; is not special pleading, to entitle to more costs than damages. *Barnes*, 124. 129.]

[Only *clausum fregit*, and assault and battery, are within 22 & 23 Car. 2.; and if plaintiff brings one action for an offence within, and another without the statute, and has a verdict for both, he shall have full costs. *Barnes*, 134.]

[But not if he recovers for that within, and not for that without. *Barnes*, 144.]

[Several justifications to trespasses in different places, and not guilty to novel assignment, all found for defendant but this last, no more costs than damages. *Barnes*, 149.]

Where the action did not commence at *Westminster*, but is removed out of an inferior court. *Semb.* 2 *Lev.* 124. R. 4 *Mod.* 379.

Where the action is for disturbing his common. R. 2 *Mod.* 141.

Or, for chasing his sheep, &c. R. 1 *Sal.* 208.

[So, for chasing his cow and fowls with dogs, full costs. *Keen v. Whistler*, M. 9 G. Str. 534.]

[For entering his close and chasing his bull, full costs. *Thompson v. Berry*, P. 9 G. Str. 551.]

[For taking *vi & armis* plaintiff's horse, and sending and conveying him from A. to B., full costs. *Harper v. Jiffer*, T. 10 & 11 G. 2. B. R. H. 375.]

Neither does it extend to debt, *assumpsit*, account, *trover*, *detinue*, &c. where the title to land cannot come in question. 1 *Sal.* 208.

Nor, to the battery of a servant, *per quod servitium amisit*. 5 *Mod.* 74. 1 *Sal.* 208.

[In trespass for criminal conversation with plaintiff's wife, he shall have full costs, (without the judge's certificate,) tho' the damages under 40 s. *Batchelor v. Bigg*, M. 13 G. 3. 3 *Wilf.* 319. 2 *Bl. Rep.* 854.]

Nor, by the *st.* 4 & 5 W. & M. 23. to trespass against an inferior tradesman for hunting, hawking, fishing, or fowling.

[But in trespass for hunting, brought, under this statute, against the defendant, as a *dissolute* person, &c. If the plaintiff prove the trespass, but not the special circumstances of the defendant being a dissolute person, &c. and recover a verdict for less than 40 s. he shall have judgment, as in a common action of trespass, but no more costs than damages. 2 *Bl. Rep.* 900.]

And every tradesman seems to be intended by *inferior tradesmen*. *Paf.* 9 W. 3. *Bennet and Thalbois*, 1 *Sal.* 212. (*Com.* 26.)

[A clothier and alehouse-man found an inferior tradesman by jury, pays full costs under 4 & 5 W. & M. *Barnes*, 125.]

[Who is an inferior tradesman, under *st.* 4 & 5 W. & M. c. 23. is not determined; court divided, and no rule. *Cive and Bathurst*].

thought every tradesman not qualified, and that it is a question of law; *Willes C. J.* and *Noel J.* that not every trademan, and that it should be left to the jury. *Buxton v. Mingay*, T. 30 & 31 G. 2. 2 *Wils.* 70.]

Nor by the *st.* 8 & 9 W. 3. 11. to a trespass which appears at the trial, and is certified by the judge upon the record, to be wilful and malicious.

[In wilful and malicious trespass, by *stat.* 8 & 9 W. 3. c. 11. *ff.* 4. the judge of *nisi prius* must certify in open court at the trial; his certificate afterwards is void. *Ford v. Parr*, P. 28 G. 2. 2 *Wils.* 21. *Doug.* 109. n. 46.]

[If it appear on the trial that the trespass, however small, was committed after notice, and the jury give less than 40s. damages, the judge has no discretion, but is bound to certify the trespass to have been wilful and malicious. *Reynold v. Edwards*, B. R. M. 35 Geo. 3. 6 T. R. 11.]

And tho' the *st.* 22 & 23 Car. 2. says, the judgment shall be void, it shall not be avoided by plea. 2 *Vent.* 36.

(A 3.) *Where plaintiff shall pay costs, if he do not recover more than 40s. damages.*—[By *st.* 3 Jac. 1. c. 15. *f.* 4. if in any action of debt, or action on the case on *assumpsit*, to be sued or prosecuted by any citizen, and freeman of the city of London, or other person inhabiting within the same city, or the liberties thereof, being a tradesman, victualler, or labouring man, against any such person as aforesaid, in any of the king's courts at Westminster, or elsewhere, out of the court of requests established by this act, it shall appear to the judge or judges of the court where such action shall be sued, that the debt of the plaintiff doth not amount to the sum of 40s., and the defendant shall duly prove by sufficient testimony, or by his own oath, that at the time of commencing the action, he the defendant was inhabiting in the city or liberties thereof, the plaintiff shall not be allowed any costs, but shall pay so much ordinary costs to the defendant, as the latter shall prove it hath truly cost him in the defence of the said suit.]

[Provided that this act shall not extend to debt for rent on a lease, or any other real contract, or any debt arising on a cause concerning testament or matrimony, or properly belonging to the ecclesiastical court. *f.* 6.]

[Under this proviso, actions for use and occupation cannot be sued in the court of conscience in London, and therefore no costs to defendant sued in the superior courts. *Doug.* 244.]

[The proper mode for the defendant to take advantage of this statute, seems to be, by application to the court by affidavit, for leave to enter a suggestion on the record. *Vid. Str.* 46. 1120. 1191. 1 *Wils.* 19. *Doug.* 245. n.]

[And if plaintiff demur to the suggestion, and judgment be given for the defendant, the latter shall have the costs of the whole, demurrer included. *Str.* 1120.]

[It seems by the words of the act, that the suggestion should set forth that both plaintiff and defendant are resident within the city or liberties. *Vid. the Cases before cited.*]

[By *st.* 23 G. 2. c. 33. *f.* 19. if any action of debt, or action on *assumpsit*, shall be commenced and prosecuted in any of the courts at Westminster,

Westminster, and the defendant at the time of the action brought, reside in the county of *Middlesex*, and be liable to be summoned to the county court, and damages be given under 40s. unless the judge shall in open court certify on the back of the record, that the freehold, or title to the plaintiff's land, principally came in question, or an act of bankruptcy, no costs shall be awarded to the plaintiff, but defendant shall recover double costs of suit.]

[On this statute the defendant shall have *double costs*, whether plaintiff sue in his own right, or as *personal representative*. *Doug.* 246.]

[But a personal representative cannot be *sued*, in the county court of *Middlesex*, and shall therefore pay costs, though the *damages* be under 40s. *Doug.* 263.]

[The defendant is not entitled to double costs under this act, whether he himself or the plaintiff is an attorney. *Doug.* 381.]

[The defendant shall not have his costs under either of these acts, where the plaintiff's demand is reduced under 40s. by a set-off. *Str.* 1191. 1 *Wilf.* 19. *Doug.* 448.]

[Nor, where there is a plea of *tender* as to part, and *non assumpsit* as to the residue, and the issue on the tender found for the defendant, and the balance proved, under 40s. *Doug.* 448.]

(A 4.) By an Avowant.

By the *st.* 7 *H.* 8. 4. an avowant, or he who makes *conuſance* in *replevin*, or second deliverance for rent, custom, or service, if it be found for him, or the plaintiff be barred, shall recover damages and costs, as the plaintiff should have done if he had recovered.

So, by the *st.* 21 *H.* 8. 19. he who avows, &c. *ford amage-feasant*, or other rent.

And by equity, if he avows for an *amerciament* in a court leet or baron. *R. Mo.* 893. *R.* 2 *Cro.* 520. *R. cont. Cro. El.* 300. *Dub. Cro. Car.* 534. *Semb.* 2 *Rol.* 75. *Court divided, Jon.* 422. 434. *Cont. per Holt, Carth.* 179.

Or, for a fine in a court-leet. *R. Mo.* 893.

Or, for an *estrav*. *Dub. Ow.* 13. *Cro. El.* 258. 329. *Acc.* 2 *Cro.* 520.

Or, for a *heriot*. 2 *Cro.* 28.

Or, for a *relief*. *Dub.* 2 *Cro.* 28. *Jon.* 422.

Or, for the penalty of a by-law. *Per two J.* *Jones cont. Cro. Car.* 534. *Jon.* 421.

[But avowant of seizure for *heriot-custom* is not entitled to costs under 11 *G.* 2. c. 19. *Lloyd v. Winton*, *M.* 29 *G.* 2. 2 *Wilf.* 28. *Barnes*, 148. *Infra*, (C 2.)]

And the avowant shall have costs, tho' judgment be against the plaintiff upon demurrer. *R.* 2 *Cro.* 520.

Or, the plaintiff be nonsuited. *M.* 13 *W.* 3. *inter Smith and Walgrave.* (*Com.* 122.)

So, if an executor avows by force of the *st.* 32 *H.* 8. 37. tho' it be a subsequent statute to 21 *H.* 8. 19. *R.* 2 *Rol.* 457.

So, though several issues be joined upon the avowry, and some found for, and some against him, and the plaintiff has not costs for the issues found for him. *R.* 2 *Cro.* 473. *Dub.* 2 *Rol.* 37. *R. acc.* 2 *Rol.* 140.

[If

[If some issues are found for avowant, and some against him, costs for one shall be deducted out of the other. *Barnes*, 146.]

But if a defendant in *replevin* pleads in abatement, and avows for a return, and has judgment, that the plea shall abate, and for a return; he shall not have costs. *R. M.* 13 *W.* 3. *B. R. inter Smith and Walgrave.* (*Com.* 122.)

If he pleads property. *Hard.* 153.

[But if one of two defendants in *replevin*, be acquitted alone, he cannot have costs. 1 *Bl. Rep.* 355.]

[And an avowant shall himself pay costs, on special avowries found against him. *Doug.* 709. *n.*]

[And shall not have costs on the affirmance of a judgment in his favour, on a writ of error. *Id. ibid.*]

[Where some issues in *replevin* are found for the plaintiff, which entitle him to judgment, and some for the defendant, the latter must be allowed the costs of the issues found for him out of the general costs of the verdict, unless the judge certify that the plaintiff had probable cause for pleading the matters on which those issues are joined. 2 *Term Rep.* 235.]

[An avowant for a *rent-charge* is not entitled to double costs under the *stat.* 11 *Geo.* 2. *c.* 19. when the plaintiff is nonsuited. *Lindon v. Collins*, *C. P. M.* 17 *Geo.* 2. *Willes*, 429.]

(A 5.) By a Tenant, or Defendant.

(A 5.) *In an action.*] By the *st.* 23 *H.* 8. 15. If a plaintiff be nonsuited, or have verdict against him, in an action upon the *st.* 5 *R.* 2. in debt or covenant on specialty made to the plaintiff, or on a contract with the plaintiff, in *detinue*, if property be alleged in the plaintiff, in account against a bailiff or receiver to the plaintiff, in an action on the case, or on a statute for a personal wrong or offence to the plaintiff, the defendant shall have costs. [*Corp.* 407.]

So, if judgment be against the plaintiff upon demurrer. *R.* 1 *And.* 117. *Vide infra.*

[The *stat.* 18 *Eliz.* *c.* 5. *f.* 3. which gives costs to defendant in popular actions if the plaintiff be nonsuited, extends to subsequent as well as prior statutes. *Williams v. Drewe*, *C. P. M.* 16 *Geo.* 2. *Willes*, 392. *Plymouth v. Werring*, *C. P. H.* 17 *Geo.* 2. *Willes*, 440.]

And by the *st.* 4 *Jac.* 3. in trespass, ejectment, or other action, where plaintiff should have had costs, if he had recovered.

So, by the *st.* 8 *El.* 2 & 13 *Car.* 2. 2. if the plaintiff be nonsuited for want of declaration, or afterwards discontinue, or be nonsuited.

[If the plaintiff enter a *noli prosequi*, the defendant is entitled to costs under the statute of *Elizabeth*. *Cooper v. Tiffin*, *B. R. M.* 30 *Geo.* 3. 3 *T. R.* 511.]

So, by the *st.* 4 *G.* 2. 28. if in any ejectment the plaintiff be nonsuited, unless for want of confessing lease, entry, and ouster.

So, by the *st.* 8 & 9 *W.* 3. 11. if judgment be against the plaintiff or demandant upon demurrer, in bar. *R.* 1 *Sal.* 194. *Mod. Ca.* 88.

[If defendant pleads not guilty, and not guilty within six years; and issue on the first is found for plaintiff, and then demurrer on the second is found for defendant; there shall be no costs on either side

on the trial, and defendant shall have costs on the demurrer. *Cooke v. Sayer*, H. 32 G. 2. 2 B. M. 753.]

[And in general, where different issues are joined on different pleas, the defendant is allowed his costs, on those issues which are found for him. *Dict. per Buller J. Doug.* 678. *Vid. supra*, (A 1.)]

[Where the defendant in replevin pleads several pleas in bar of an avowry, on which issues are joined, and one of them is found for him, which establishes his right of action, and the others for the defendant, and the judge does not certify under *stat. 4 Ann. c. 16.* the defendant is entitled to the costs not only of the pleadings, but also of the trial of those issues which are found in his favour. *Brooke v. Willet*, C. P. H. 35 Geo. 3. 2 H. Bl. 435.]

Or, the plaintiff in prohibition, *scire facias*, debt upon *st. 2 Ed. 6. 13.* or in waste, be nonsuited, discontinues or has a verdict against him.

[Verdict for defendant in prohibition, as to part, he has costs. *Barnes*, 138.]

So, by the *st. 4 & 5 W. & M. 18.* an informer, if a verdict be against him, or a *nolle prosequi* entered by him, shall pay costs; unless the judge, on the trial, certify there was a probable cause for the information. *Vide post.* (A 6.)

[In an action *qui tam* for exercising a trade contrary to *stat. 5 Eliz. 4.* notwithstanding affidavit offered that the suit was for the benefit of the corporation *Elde v. Stephens*, H. 10 G. 2. *Lord Ray.* 1333.]

[A. convicts B. on game-laws, he pays penalty, A. brings action, B. on the justices refusing copy of conviction, brings *certiorari*, A. gets conviction affirmed, and is nonsuited in action; B. shall have costs of the *certiorari* allowed him in costs on the nonsuit. *Rex v. Midlam*, T. 5 G. 3. 3 B. M. 1720.]

[But under this act, defendant is not entitled to costs beyond the recognizance. 2 Term Rep. 45. 190.]

[By *st. 7 Jac. 1. c. 5.* if any action on the case, trespass, battery, or false imprisonment, be brought against the several officers mentioned for any thing done in the discharge of their duty, and the plaintiff be nonsuit, or discontinue, or a verdict be given against him, the defendant shall have double costs.]

[But in case of a verdict, to entitle him to these, it must be certified by the judge who tried the cause, that the defendant acted by virtue of his office. *Doug.* 307.]

[Unless on a *special* verdict, it appear by the facts there found, that the defendant was acting by virtue of his office. *Id. in the notes.*]

And therefore now, in all cases where the plaintiff would have costs, if he had recovered, the tenant or defendant shall have costs, if the plaintiff be barred or nonsuited.

If he be barred upon a special, as well as upon a general verdict. *R. Cro. El.* 465.

Or, discontinue after a special verdict. *Dub. Cro. Car.* 575.

And this, since the *st. 4 Jac. 3.*—But not upon the *st. 23 H. 8. 15.* if the action be not for a personal wrong or offence. 2 *Leo.* 9. 52. 3 *Leo.* 68.

As in an action upon the case generally, or in an action upon a statute.

In *warrantia charta.* *Semb.* 3 *Lev.* 322.

[On

[On issue tried, a case stated, and argued in court, but the facts not being sufficiently stated, the court recommended, and parties agreed to go to a new trial, where plaintiff was nonsuited; and defendant had costs upon the whole, and not the nonsuit only. *Herring v. Davila*, P. 6 G. Str. 300.]

So, the defendant shall have costs, where the plaintiff would be entitled to costs generally in the same action, tho' he would not have had them in that particular case: as, if the plaintiff be nonsuited in an action for words, which are not actionable. *R. Hut.* 16. *Hob.* 219.

So, if the plaintiff be nonsuited, &c. but the declaration is insufficient. *R. 2 Rol.* 88. 213. *R. Cro. Car.* 175. *Cont. Cro. Car.* 545, where a verdict was for the plaintiff, and judgment arrested for a fault in the declaration.

So, if the plaintiff be nonsuited at *nisi prius*, &c. tho' the plea of the defendant be insufficient. *R. Mo.* 625.

Or, enters a *nolle prosequi*, or *retraxit*. *Dub. Hard.* 152.

[So, where a defendant removes proceedings by a *re. fa. lo.* from a county court, into one of the superior courts, and signs judgment of *non pros*, in default of plaintiff's appearing, he is entitled to costs, by *st. 4 Jac.* 1. c. 3. 1 *Term Rep.* 372.]

[For not going on to execute a writ of inquiry; as, for not going on to trial. *Shedford v. Houston*, T. 6 G. Str. 317. *Sutton v. Bryan*, M. 13 G. *Cobb v. Kingmill*, T. 13 G. Str. 728. P. 12 G. 2. *Barnes*, 230.]

So, a defendant, being an executor or administrator, shall have costs; though a plaintiff, executor, or administrator, does not pay costs. *R. Cro. El.* 503.

So, a defendant shall have costs where the plaintiff sues as executor, or administrator, if it be for a wrong to himself, or upon his contract; as in trespass or trover for goods of the testator taken out of the possession of the executor himself. *Hut.* 79. *R. Cro. Car.* 219. *Jon.* 241. *R. Latch*, 220. *R. cont. per totam curiam*, 3 *Lev.* 60. *R. acc. in C. B.* 6 *Ann. inter Hunt and Ballow.* (Com. 163.) *R. Sav.* 133, 4. *Vide post.* (A 7.)

[If executor of an attorney declares that testator did business for defendant, and leaving it unfinished, plaintiff caused it to be finished, and in consideration defendant undertook to pay, and plaintiff is nonsuited, he shall pay costs. *Marsh v. Yellowly*, H. 12 G. 2. Str. 1106. *Andr.* 356.]

In ravishment of a ward out of the custody of the executor. *Dub. Cro. Car.* 29. *Hut.* 79. *Cont.* 3 *Lev.* 60.

In debt for rent upon a lease by the executor, of a term of the testator. *Hut.* 79.

In account against one as his receiver. *Semb. Bend. pl.* 28. *R. Dal.* 96.

In trover for goods, of which his testator died possessed, and which afterwards came to the hands of the defendant by finding, tho' he does not allege any possession in himself; for the finding was in his time, and he might have had the action in his own name. *R. Jon.* 241. *R. 1 Vent.* 109. *R. in C. B.* P. 8 *Ann. inter Hole and King*, (Com. 162.) *Harris v. Hanna*, H. 6 G. 2. *B. R. H.* 204.

[If an executor declare on a trover and conversion in the testator's life-

lifetime, and also on a trover and conversion after his death, and be nonsuited, he is not liable to costs. *Cockerill v. Kynaston*, B. R. E. 31 Geo. 3. 4 T. R. 277.]

[If the conversion were in the time of the administratrix, and she be nonsuited in the action of trover, she is liable to costs, though she never were in possession of the goods from the time of the intestate's death. *Bollard v. Spencer*, B. R. T. 37 Geo. 3. 7 T. R. 358.]

[The court set aside a judgment and warrant of attorney given to secure an annuity for a defect in the memorial without costs, because it was the case of an executor. *Dickenson v. Boyne*, C. P. M. 39 Geo. 3. 1 Bos. & Pull. 335.]

So, where the plaintiff in ejectment declares upon the demise of an executor, and is nonsuited; for the action is his proper action, and he is bound by the rule. *Per C. B. M. 5 Ann.*

In an *indebitatus assumpsit* for money received to the use of the plaintiff as executor or administrator. R. 1 Sal 207. *Cont. Semb.* 1 Sal. 314. R. acc. Mod. Ca. 91. 181. acc. Barnes, 119. [Acc. Lord Raym. 437. 5 Term Rep. 234. 2 T. R. 477.]

So, in trover by an administrator for goods of the intestate taken after his death, and before administration. R. 1 Vent. 109. R. in C. B. M. 9 Ann. Adm. 1 Sal. 314.

So, if the plaintiff sues as executor *de son tort*. Lit. 5.

So, an executor shall pay costs for not proceeding to trial upon notice. 1 Sal. 314. *Harves v. Saunders*, M. 5 G. 3. 3 B. M. 1584. Or, non-prossed for want of declaring in due time. *Ibid.* [Higgs v. Warry, B. R. E. 36 Geo. 3. 6 Term Rep. 654. *Supra*, (A 2.)]

[If a point is reserved, and there is judgment for defendant, who dies, costs must be paid his executors. Barnes, 120.]

[Executor or administrator may have attachment for costs due to the deceased. Barnes, 122. Vid. 1 Term Rep. 103.]

Prochein amy of plaintiff is liable to costs. Barnes, 128. Willes, 190. S. C.]

So, now by the *st.* 8 & 9 W. 3. 11. in trespass, assault, false imprisonment, or ejectment against several, if one or more defendants be acquitted by verdict, they shall have costs, as if the verdict had been against the plaintiff as to all; unless the judge, at the trial, immediately certify on the record, that there was a reasonable cause to make them defendants.

[Plaintiff in ejectment nonsuited, may pay costs to which defendant he pleases. *Jordan v. Harper*, P. 8 G. Str. 516.]

But if the plaintiff be nonsuited for a fault in the declaration, tho' divers defendants appear severally, they shall have only costs for one.

So, in an information, if one defendant be acquitted, he shall not have costs, though the judge does not certify. R. 1 Sal. 194.

[If there be two defendants in an action of *assumpsit*, one of whom suffers judgment by default, and the other obtains a verdict, the latter is entitled to costs. *Shrubb v. Barrett*, C. P. East. 32 Geo. 3. 2 H. Bl. 28.]

[If a declaration in trespass contain two counts, and the defendant plead to the one and suffer judgment by default on the other, and on the trial of the first the plaintiff prove only one act of trespass, which is covered by the second count, he shall pay the costs of the trial. *Compere v. Hicks*, B. R. T. 38 Geo. 3. 7 T. R. 727.]

So,

So, in debt upon the *ft.* 2 & 3 *Ed.* 6. 13. if the plaintiff be nonsuited, or has a verdict against him, the defendant shall not have costs; for it is not a debt by specialty or contract, or for a personal wrong to the plaintiff; and therefore it is not within 23 *H.* 8. 15. 2 *Inst.* 651.

If the defendant recovers costs, he may have execution for them by *capias ad satisfaciendum.* *R.* 2 *Cro.* 595.

And though judgment be afterwards reversed; the costs shall not be refunded. *Per two J. Englefield cont. Dy.* 32. a. *Mo.* 625.

[If there are two causes, *A. v. B.* and *B. v. A.*, and verdict for defendant in each; the costs in one cause cannot be set against the costs in the other, *Dutby v. Tithe*, and *Tithe v. Dutby*, *H.* 17 *G.* 2. *Str.* 1203.]

[If there is a rule for payment of costs, and the prothonotary's *allocatur*, the affidavit of service (to ground an attachment) must be on such a day, *not on or about*, for it might be on a Sunday. *Brett adj. Wadham*, *P.* 4 *G.* 3. 2 *Wils.* 227.]

[If a cause goes off for want of jury, the costs of attendance shall be allowed, *Sparrow v. Turner*, *M.* 8 *G.* 3. 2 *Wils.* 366.]

[Lessor of plaintiff, an infant or abroad, shall name good plaintiff, or give security for costs. *Anon. P.* 19 *G.* 2. 1 *Wils.* 130. *Barnes*, 183. 188.]

[Lessor of plaintiff residing in *Ireland* shall give security for costs, though ejectment is brought by direction of Chancery, where security is already given. *Denn v. Fulford*, *T.* 1 *G.* 3. 2 *B. M.* 1177. If lessor dies, security shall be given. *Barnes*, 47.]

[But in other actions the court will not require plaintiff gone abroad, and having no effects in *England* to give security for costs. *Boswell v. Irish*, *T.* 7 *G.* 3. 4 *B. M.* 2105.]

[*C. B.* will stay proceedings in ejectment, till costs of a former in *B. R.* are paid. *Barnes*, 133. *Infra*, (A 8 & 9.)]

(A 6.) *In an information.*] So by the *ft.* 18 *El.* 5, the defendant in an information shall have costs, if the informer delays his suit, discontinues, be nonsuited, or the trial or matter pass against him by verdict, or judgment against him in law. [*Vid. Corup.* 366.]

[If the prosecutor does not go on to trial, he shall pay costs. *Rex v. James*, *M.* 9 *G.* 2. *B. R.* *H.* 159.]

[If prosecutor gives notice of trial, and neither goes to trial, nor countermands in time, defendant shall have costs by the course of the court; unless defendant draws in prosecutor to give notice, by hopes of producing books, and then refuses them. *Rex v. Heydon*, *H.* 2 *G.* 3. 3 *B. M.* 1304. 1 *Bl Rep.* 356.]

Tho' he be not a common informer (unless when he is the party grieved). *R.* 4 *Leo.* 55. *R.* 1 *And.* 116.

Tho' the information be upon a penal statute made since 18 *El.* *R. Hut.* 35.

Tho' the informer obtains a verdict, if judgment be against him, for that the statute upon which the information is founded was repealed, or expired. *Semb. Hut.* 36. *but the court divided.*

If judgment be against the informer, upon a demurrer, or special verdict. *Per three J. Hut.* 36. *Garland v. Burton*, *M.* 12 *G.* 2. *Str.* 1103.

So, in all cases, where the cause passes against the informer for want of matter or form. *Per two J. but the others cont. Hut. 36.*

So, by the *st. 4 & 5 W. & M. 18.* the clerk of the crown in *B. R.* shall not file an information, &c. before a recognizance given of 20*l.* to prosecute, &c. and if a verdict pass for the defendant, or a *nolle prosequi* be procured, to pay costs taxed in three months after demand; unless the judge certify there was cause for the information.

[On a defendant's acquittal on an information he is not entitled under this act to costs beyond the extent of the recognizance entred into by the prosecutor. *Rex v. Filewood, M. 28 Geo. 3. 2 T. R. 145.*]

[And the court, on granting an information, will not require the prosecutor to give security for costs, beyond the extent of the recognizance. *Rex v. Brooke, H. 28 Geo. 3. 2 T. R. 190.*]

But the *st. 18 El. 5. s. 5.* allows any grieved, by maintenance, champerty, buying titles, or embracery, to sue on the statutes for such offences.

And it does not extend to officers of record, who, in respect of office, have used to exhibit informations, or sue on penal statutes.

Nor to officers informing for matters only concerning his or their offices.

So, if one defendant be found guilty, though the other be acquitted, he shall not have costs. *Sal. 194. Vide ante, (A 5.)*

So, where the information is by the party grieved, the defendant shall not have costs. *4 Leo. 55. R. 2 Leo. 116. R. Sav. 50. 1 And. 116.*

As, in an information for perjury. *Semb. Cro. El. 177. 1 Brownl. 66.*

If a verdict be against an informer upon a fault in pleading, no costs: as, if an information be for not inclosing a wood within a month after cutting it down; and alleges the cutting on the 10th of April, and that it lay open till the 2d of May, which is not a month, *R. Hut. 35.*

[Costs shall be allowed defendant, where the verdict is for him, though he has brought an action for the seizure, and recovered in it. *Shipton v. Newman, in Sc. M. 1721, Bunb. 90.*]

[On motion for costs against the seizer for not going on to trial, court divided. *Warwick v. Rawlins, H. 1721, Bunb. 96.*]

[If prosecutor for killing game does not reply, defendant shall have costs; for 18 *El. c. 5.* extends to informers on all penal statutes. *Law v. Worrall, M. 21 G. 2. 1 Wilf. 177.*]

[If the charge appears frivolous and groundless, on shewing cause against a *quo warranto* information, the court will discharge the rule with costs. *Rex v. Lewis, P. 32 G. 2. 2 B. M. 780. Rex v. Carpenter, P. 9 G. 2. Str. 1039.*]

[And though on a rule for an information, the court may think that a ground is laid, yet, if under the circumstances, the payment of the prosecutor's costs appears an adequate punishment, they will discharge the rule, on the defendant's undertaking so to do. *Doug. 314.*]

[Prosecutor of information in nature of a *quo warranto* shall pay costs for not going on to trial. *Rex v. Powell, H. 3 G. Str. 33.*]

[The statute of 4 & 5 *W. & M. c. 18.* extends to informations in

in nature of *quo warranto*, where prosecutor does not proceed; *stat. 9 Ann. c. 20.* only where there has been verdict or judgment. *Rex v. Morgan, P. 9 G. 2. Str. 1042.*

[The prosecutor of a *quo warranto* information against a constable of Birmingham is not entitled to costs under the *stat. 9 Ann. c. 20.* it not being a place within the meaning of the statute. *Rex v. Wallis, B. R. M. 34 Geo. 3. 5 T. R. 375.*]

[On an information *quo warranto*, if prosecutor does not procure it to be tried in the year after issue joined, defendant shall have costs as far as the recognizance extends; if it goes to trial, he may have full costs by *stat. 9 Ann. Rex v. Howel, P. 9 G. 2. B. R. H. 247.*]

[Where any one of several issues in a *quo warranto* information is found for the prosecutor, on which judgment of ouster is given; he is entitled to costs on all the issues. *Rex v. Downes, M. 27 Geo. 3. 1 T. R. 453.*]

[If there is a rule by consent to try the validity of a by-law, and judgment on the information to be entered accordingly, costs follow of course. *Rex v. Philips, H. 23 G. 2. 1 Wils. 261.*]

[On rule by consent to try right of election by feigned issue, and costs to abide the event of issue; costs shall be paid on the crown-side, as well as in the civil action. *Oldknow v. Wainwright, T. 33 & 34 G. 2. 2 B. M. 1017.*]

[If defendant is acquitted against evidence and the direction of the court, yet if no certificate that there was reasonable cause, defendant shall have his costs, tho' the chief justice who tried the cause certify *ore tenus*, that the verdict was against evidence. *Rex v. Woodfall, P. 13 G. 2. Str. 1131.*]

[Where treble costs are to be recovered against a prosecutor for a matter not appearing on the *poslea*, court will allow a suggestion of the special matter on the record. *Rex v. Poland, E. 3 G. Catheral v. Cooper, H. 5 G. 2. Str. 49.*]

[On an indictment in *B. R.* for not repairing the highway, costs were allowed to the prosecutors, tho' judgment was not entered; and the recognizance discharged on the ways being mended. *Queen v. Hornsey, P. 1 G. Fort. 255.*]

[A justice of the peace who indicts a road for being out of repair, (the indictment being afterwards removed into *B. R.* by *certiorari*), is entitled to costs under *stat. 5 & 6 W. & M. c. 11. s. 3.* if defendant be convicted. *Rex v. Kettleworth, B. R. M. 33 Geo. 3. 5 T. R. 33.*]

[The prosecutor of an indictment for stopping a common footway, who had used it for some years before it was stopped, is a party grieved within the meaning of this statute. *Rex v. Williamson, M. 37 G. 3. 7 T. R. 32.*]

[If the defendants in an indictment for not repairing a road (and which is removed into *B. R.* by *certiorari*) be acquitted for want of prosecution, the court has no power to award costs on the grounds of its being a vexatious prosecution under the *stat. 13 Geo. 3. c. 78. s. 65.* but the application must be made to the judge at *Nisi Prius*. *Rex v. Chadderton, E. 33 Geo. 3. 5 T. R. 272.*]

[If the judge on the trial of an indictment for not repairing a road certify that the defence was frivolous, without also awarding costs in express terms under the *stat. 13 Geo. 3. c. 78.* the prosecutor is entitled to costs. *Rex v. Clifton, T. 35 Geo. 3. 6 T. R. 344.*]

[If

[If costs are ordered to be paid to or by a defendant, and he dies before payment, his executor shall neither have nor pay them. *Rex v. Earl*, T. 4 G. 2. Str. 874. Vide 1 T. R. 103. *contra*.]

[Defendant shall have costs, though he himself removed the information. *Dover v. Hodgson*, T. 19 & 20 G. 2. 1 Wils. 139. Vide *Certiorari* (B).]

[On a conviction for deer-stealing affirmed, costs shall be taxed, as between attorney and client. *Rex v. Dore*, H. 12 G. 2. And. 352.]

[If there is a rule for a special jury, and they do not appear, and neither side prays a *tales*, and the defendant has a warrant for a *tales* in his pocket, he shall not pay costs. *Rex v. Righton*, P. 5 G. 3. 3 B. M. 1694.]

(A 7.) *When a defendant shall not recover costs.*] But the defendant shall not have costs, if the plaintiff discontinues his original. *R. 1 Leo*. 105. Vide *ante*, (A 6.)

Or enters a *nolle prosequi* after issue; for it is a bar to another action, and therefore differs from a nonsuit. *Dub. Hard*. 153.

[If a *scire facias* (or the writ in an action) is abated by the plea, no costs shall be paid though the party move to quash his own writ. *Pocklington v. Peck*, M. 12 G. Str. 638.]

[If plaintiff on plea in abatement, enters *nil capiat per breve*. *Barnes*, 120. 257.]

If the plaintiff be nonsuited in an assise; for the statute does not extend to an assise. 1 *Brownl*. 28, 9.

So, he shall not have costs, if a repleader be awarded. 2 *Vent*. 196. *R. Mod. Ca*. 2.

[Where a new trial has been granted, and nothing was said in the rule concerning the costs of the first, although the same party succeed on the second trial, he shall not have the costs of the first. *Mason v. Skurray*, B. R. T. 20 Geo. 3. Doug. 438.]

[Where a case is reserved, and from the insufficient state of it, it is necessary to send it down to a second trial, and nothing is said respecting the costs, the party succeeding on such second trial is not entitled to the costs of the first. *Hankey v. Smith*, B. R. M. 30 Geo. 3. 3 T. R. 507. *Smith v. Haile*, B. R. M. 35 Geo. 3. 6 T. R. 71.]

[Where a *venire de novo* is awarded, the party succeeding is entitled only to the costs of the second trial. *Lickbarrow v. Mason*, B. R. M. 35 Geo. 3. 6 T. R. 131.]

[Where a cause having been once tried, a new trial is granted, but a juror withdrawn, on the party who gained the verdict at the first trial, undertaking generally to pay the other his costs; such an undertaking includes only the costs of the second trial. *Rouse v. Bardin*, C. P. E. 31 Geo. 3. 1 H. Bl. 639.]

[Where a cause is twice tried, and the verdict is found on each trial for the same party, he is entitled to the costs of both; but where the verdicts are found for different parties, the costs of the first trial are not allowed. *Trelawney v. Thomas*, C. P. E. 31 Geo. 3. 1 H. Bl. 641.]

[After the argument of a special case the court directed a new trial because the case was insufficiently stated; the defendant, without again going to trial, gave the plaintiff a *cognovit*; and the court held

that the defendant was liable to pay the costs of the former trial. *Booth v. Atherton*, B. R. H. 35 Geo. 3. 6 T. R. 144.]

[The general term *costs* in a rule of reference does not include the costs of that reference. *Bradley v. Tunstow*, C. P. E. 37 Geo. 3. 1 Bos. & Pull. Rep. 34.]

[They cannot award the costs of reference, unless power is expressly given to them for that purpose. *Candler v. Fuller*, C. P. H. 11 Geo. 2. Willes, 62.]

[But if in such a case they award the plaintiff his costs of suit and charges of arbitration, to be taxed by the proper officer, and the officer tax only the former, the award will be good for the former, and bad as to the latter. *Ibid.*]

[If arbitrators award the defendant to pay the plaintiff his costs of suit, to be taxed by the proper officer before a particular day, it is the business of the defendant to have them taxed before that day. *Ibid.*]

[Arbitrators may award costs without any express authority for the purpose. *Roe v. Doe*, B. R. M. 29 Geo. 3. 2 T. R. 644.]

[An award of "costs sustained in the action," does not include the costs of the reference. *Browne v. Marsden*, C. P. E. 29 Geo. 3. 1 H. Bl. 223.]

So, the defendant shall not have costs, where the plaintiff in an action of the like nature shall not have costs, if he recovers; as, in an attainder. *R. Cro. Car.* 542. *Jon.* 432.

In an action upon a penal statute by *qui tam*, &c. *R. Hut.* 22. 1 *Brownl.* 66.

[An informer *qui tam* is liable to costs under the *st.* 18 *Eliz. c.* 5. *f.* 3. *Wilkinson v. Allot*, M. 16 Geo. 3. *Corup.* 366.]

So, a defendant shall not have costs, if the plaintiff, being an infant, sues by guardian. *R. Cro. El.* 33.

If a plaintiff, being executor or administrator, sues merely in the right of his testator, &c. for the *st.* 23 *H.* 8. 15. extends only to an action upon a contract or wrong to the plaintiff himself; and the *st.* 4 *Jac.* 3. enlarges costs as to more actions, not against more persons. *R. Hut.* 69. *D. Cro. El.* 503. *R. Tel.* 168. *Dal.* 96. *Bend. pl.* 28. *R. 2 Rol.* 87.

As, in an action for goods taken away in the life of the testator. *Hut.* 79.

In debt upon an obligation to the testator; tho' the defendant pleads *non est factum*, and it is found for him. *R. 2 Cro.* 229.

[Or, though the breach be assigned after the testator's death. *Portman v. Came*, H. 12 G. *Sir.* 682. 2 *Ld. Raym.* 1413.]

Or, pleads payment to the executor himself, and it is found so. *R. 1 Vent.* 92.

[The defendant in *indeb. assump.* shall not have costs of plaintiff executor, though more money paid into court than the verdict. *Knight v. Dukes of Hamilton*, in *sc. P.* 1717, *Bunb.* 44.]

So, in an action for an escape of a person in execution to the testator. *R. 1 Rol.* 63.

Or, in execution upon his suit as executor. *R. 2 Cro.* 361.

So, in *assumpsit* upon a *computasset* with the testator. *R. 2 Jon.* 47. *R. 1 Sal.* 207. 314.

Or, with the executor himself for money of the testator. *R. 2 Jon.* 47. 2 *Lev.* 165. 3 *Lev.* 60. 1 *Sal.* 208.

So,

So, in *trover* for money of the testator out of his own possession. *Vide ante*, (A 5.) *cont. acc. per Holt*, 1 *Sal.* 208.

In *trover* for goods of the testator which he lost in his lifetime, tho' the conversion be alleged in the time of the executor. *R. in C. B. 6 Ann. inter Hunt and Ballow, per Holt*, 1 *Sal.* 208. (*Com.* 163.)

So, the defendant shall not have costs, if the plaintiff, executor, or administrator, be nonsuited within the *st.* 8 *El.* 2. *R. Cro. El.* 69.

[If administrator discontinues with leave, he pays no costs. *Baynham v. Matthews*, T. 4 *G.* 2. *Str.* 871.]

Or, if an executor or administrator brings error upon a judgment against his testator, or himself. *Vide post.* (B).

If the plaintiff takes administration when there was an executor living. *R. Lit.* 5.

If the plaintiff sues as executor, and upon issue, that he was not executor, it be found for the defendant. *R. 1 Brownl.* 79.

So, the defendant shall not have costs by the *st.* 8 & 9 *W.* 3. 11. if judgment be for him upon demurrer to his plea in abatement. *R. 1 Sal.* 194.

[So, he shall not have costs for not proceeding to trial, if he has had judgment as in case of a nonsuit. 2 *Bl. Rep.* 1110.]

[The court of *C. P.* will make the payment of costs for not proceeding to trial, a term of discharging a rule for judgment as in case of a nonsuit. *Jolliffe v. Morris*, *C. P. E.* 37 *Geo.* 3. 1 *Bos. & Pull. Rep.* 38.]

[Defendant acquitted in trespass on the case is not entitled to costs under 8 *W.* 3. only in trespass *vi et armis*. *Dibben v. Cooke*, *H.* 8 *G.* 2. *Str.* 1005.]

So, the defendant shall not have costs by the *st.* 23 *H.* 8. 15. if the plaintiff be admitted *in formâ pauperis*.

Nor, by the *st.* 24 *H.* 8. 8. if the plaintiff sues upon a recognizance, specialty, or contract to the use of the king.

But if there be a plaintiff *in formâ pauperis*, the court may tax costs, which the plaintiff shall pay, or be whipped. 1 *Sid.* 261. 2 *Sal.* 506.

And he shall be dispaupered, where he has an estate, though he owes the value. *Per Holt*, *Sal.* 507.

[A pauper, as such, can never pay costs. *Rice v. Brown*, *C. P. E.* 37 *Geo.* 3. 1 *Bos. & Pull. Rep.* 39.]

[Where he misbehaves himself, he may be dispaupered, and thereby rendered liable to costs. *Ibid.*]

[He may receive costs for the defaults of his opponents. *Semb. Ibid.*]

If the jury gives costs where they ought not to be, the court shall give judgment without respect to the costs. *R. 2 Sand.* 257.

Tho' the plaintiff does not release the costs. *Ibid.*

[Plaintiff shall not pay costs for not proceeding to trial according to notice, if his default is not wilful. *Barnes*, 133.]

[Inquiry to be executed before judge of assize, plaintiff gives notice for a particular day, and does not execute, no costs; for notice should have been general. *Barnes*, 135.]

[Defendant in *trover* has no costs. *Barnes*, 139.]

[Assault and battery against two, who plead not guilty, and one *son assault* also; guilty both on the general issue, for defendant on *son assault*, yet he has not costs. *Barnes*, 143.]

[Trespass against four, three acquitted; they cannot have their costs deducted out of the costs to be paid by the other defendant found guilty. *Barnes*, 145.]

[Several justifications to trespasses in different places, and not guilty on novel assignment, all found for defendant but the last; he has not costs. *Barnes*, 149.]

(A 8.) *In what cases the court will stay proceeding till costs paid by plaintiff.* [The court will not stay proceedings in an ejectment till the costs of a former brought for the same premises are paid. 1 *Term Rep.* 491. *Semb. cont.* 2 *Str.* 1099. where plaintiff countermanded in time.]

[But where the first ejectment was brought in another court? *Qu. Id. ibid.*]

[After a nonsuit in trespass, the court will stay proceedings in a second action between the same parties for the same cause, till the costs of the nonsuit are paid, notwithstanding the plaintiff be a prisoner, at the time of bringing the second action, and sue *in forma pauperis*. 2 *Term Rep.* 511.]

[So in an action on the statute of bribery, under the same circumstances.]

[So, in an action for a malicious prosecution. *Id. ibid.*]

[So, in an action of ejectment brought to try the same title. *Keene v. Angel*, B. R. T. 36 *Geo* 3. 6 *T. R.* 740.]

[So, in an action on the case where the merits have been fully tried. 2 *Bl. Rep.* 741.]

[Otherwise, in a *qui tam* action, by a different plaintiff against the same defendant. *Cowp.* 322.]

[But leave will be given to discontinue *in formædon*, without paying the costs of two former ejectments. 2 *Bl. Rep.* 758.]

(A 9.) *Till security be given for payment of costs.*—[So, in some cases the court will stay proceedings till security be given for costs by the plaintiff.]

[Thus where an infant sues, the court will oblige the guardian or attorney to give security. 1 *Term Rep.* 491.]

[Where the lessor of the plaintiff in ejectment is an infant. *Cowp.* 24.]

[But otherwise, where the lessee is an infant, for he is but nominal plaintiff. *Barnes*, 188.]

[So, where plaintiff resides abroad, for he is out of the jurisdiction of the court. 1 *Term Rep.* 267. Tho' this was formerly refused. *Vid.* 2 *Bur.* 1026. 4 *Bur.* 2105. *Cowp.* 158.]

[So, for the same reason where plaintiff resides in *Ireland* or *Scotland*. *Id.* 362.]

[The court will not require a plaintiff to give security for costs merely on account of his residence abroad. There must be special circumstances to induce the court to require it. *Parquot v. Eling*, C. P. H. 29 *Geo* 3. 1 *H. Bl.* 106. *Ganesford v. Levy*, C. P. M. 33 *Geo* 3. 2 *H. Bl.* 118. *contra.*]

[The court will sometimes grant a rule for this purpose after issue joined. *Barker v. Hargreaves*, H. 36 *Geo* 3. B. R. 6 *T. R.* 597.]

[After the defendant has agreed to take short notice of trial, the court

court will not compel plaintiff, a foreigner and resident abroad, to give security for costs. *Michel v. Pariski*, C. P. H. 36 Geo. 3. 2 H. Bl. 593.]

[An uncertificated bankrupt, bringing an action of *trover* for goods, was required to give security for the costs, in case he should fail in his suit. *Webb v. Ward*, B. R. E. 37 Geo. 3. 7 T. R. 296.]

[A foreign seaman having brought an action for his wages, against a foreigner, the court refused to compel him to give security for his costs, on account of his being on a voyage on board an *English* ship. *Henschen v. Garver*, C. P. M. 34 Geo. 3. 2 H. Bl. 383.]

[The court will not stay proceedings till security be given in an action by a foreign seaman serving on board an *English* ship. 1 *Bef. & Pull. Rep.* 96.]

[If a foreigner sue two defendants, and one of them only put in bail, that one may require the plaintiff to give security without putting in bail for the other defendant. *Carr v. Shaw*, B. R. M. 36 Geo. 3. 6 T. R. 496.]

[Whether an informer *qui tam*, being in mean circumstances, shall give security? *Qu. Vid. Barnes*, 125. 180. *Cowp.* 24.]

[The court will not require the plaintiff in a *qui tam* action to give security for costs, though it appear by affidavit that he is insolvent. *Field v. Garrow*, C. P. E. 32 Geo. 3. 2 H. Bl. 27.]

[But they will order the issue money to be paid into the hands of the prothonotary. *Ibid.* 3 *Term Rep.* 157.]

(A 10.) *To what time plaintiff shall have costs.*—[A plaintiff is entitled to all the costs till the time of the defendant's paying money into court, though he afterwards proceed in the action. 1 *Term Rep.* 629. 712.]

[Defendant pleading an insolvent act, has costs to the time of his plea. *Barnes*, 136.]

[If plaintiff replies after money paid in, he cannot afterwards take it out and enter acquittal, without leave of the court and payment of defendant's costs. *Barnes*, 357.]

[A *pauper* plaintiff shall have the money out of court, tho' the verdict is for defendant; if not a *pauper*, defendant would have it towards his costs. *Lee v. Holland*, T. 1730, *Bunb.* 287.]

[If plaintiff recovers a less sum, defendant shall have the money towards his costs. *Barnes*, 280.]

[Money brought into court on pleading a tender, cannot be taken out by defendant towards his costs, tho' he has a verdict. *Cox v. Robinson*, H. 9 G. 2. *Str.* 1027. B. R. H. 206.]

[If defendant does not pay the costs taxed, tho' plaintiff recovers less than the money paid into court, yet he shall have his costs, *Hand v. Dinely*, H. 18 G. 2. *Str.* 1220.]

[If defendant refuses to pay costs, attachment shall go. *Barnes*, 283.]

[Though plaintiff dies before trial, defendant cannot have back the money. *Barnes*, 281.]

[After refusal, or issue joined, plaintiff may have it and costs, to the time of paying in, he paying defendant subsequent costs. *Barnes*, 280. 282. 284. 287. 357. *Davis v. Mansell*, C. P. M. 13 Geo. 2. *Willes*, 191.]

[Plaintiff shall have the money, tho' judgment is arrested. *Barnes*, 284.]

[It may be brought into court in an action at the suit of an executor, and he shall lose costs, but not pay them. *Crutchfield v. Scott*, P. 1 G. 2. Str. 796. *Barnes*, 289.]

[If plaintiff is an administrator, and not so named, rule shall be discharged. *Barnes*, 280.]

[It shall not be paid back to executors on defendant's death, *Barnes*, 279.]

[It is not of course, if plaintiff is an executor. *Barnes*, 279.]

[*A.* is indebted to *B.* 2*l.* 5*s.* for rent, and is always ready to pay; *B.* keeps out of the way, and brings action; *A.* summons him before a judge to shew cause, why, on payment of debt and costs, proceedings should not be stayed; *B.* pretends other demands, which obliges *A.* to obtain the common rule to pay the money into court with costs; *B.* applies to take the money, and have the costs taxed; this is oppressive, and the court will discharge the rule as to costs. *Johnson v. Houlditch*, P. 31 G. 2. 1 B. M. 578.]

[If the defendant pay money into court, and the plaintiff proceed to trial, when a juror is withdrawn, the plaintiff is not entitled to the costs up to the time of paying money into court. *Stodhart v. Johnson*, B. R. E. 30 Geo. 3. 3 T. R. 657.]

[If defendant pay money into court, and plaintiff nevertheless proceed to trial, where a verdict is given against him, he is not entitled to the costs up to the time when money was paid into court. *Stevenson v. Yorke*, B. R. M. 31 Geo. 3. 4 T. R. 10.]

[If defendant pay money into court, which the plaintiff agrees to accept, he may serve the defendant with notice of an appointment before the master to tax the costs. *Kabell v. Hudson*, B. R. M. 31 Geo. 3. 4 T. R. 10.]

[The defendants in several actions on a policy of insurance paid money into court, which the plaintiff took out without taxing the costs at the time; afterwards they entered into the common consolidation rule, and the plaintiff was nonsuited in the action that was tried. It was holden that the plaintiff was not entitled to the costs in any of the actions up to the time of paying money into court. *Bursfall v. Horner*, B. R. T. 37 Geo. 3. 7 T. R. 372. *Vide Pleader*, (C 10.)]

(B) Costs in Error.

BY the *st.* 3 H. 7. 10. confirmed by the *st.* 19 H. 7. 20. if tenant, defendant, or other bound by judgment, sue a writ of error in delay of execution, and discontinue it, be nonsuited, or have judgment affirmed, he shall pay costs and damages at the discretion of the justices.

And if the judgment be affirmed, &c. the defendant in error shall have costs, tho' costs were not recoverable in the first action; as, in a *quare impedit*. Dy. 77. a. R. Cro. Car. 145. 175.

In a *quod permittat* for abating a nuisance. R. Cro. El. 659.

So, the defendant in error shall have costs, tho' the error be in the Exchequer, upon the *st.* 27 El. 8. Cro. El. 588.

By the *st.* 8 & 9 W. 3. 11. in error in judgment for defendant, if the

the judgment be affirmed, or the plaintiff discontinue, or be nonsuited, the defendant or tenant shall have costs.

So, by the same statute, if error be sued of a judgment on demurrer.

And by the *st.* 4 & 5 *Ann.* 16. if a writ of error be quashed for variance, or other defect, which was not before. 5 *Mod.* 67. *Mod. Ca.* 137.

[A writ of error having been quashed because brought by a *feme-covert*, the defendant in error is entitled to costs. *M'Namara v. Fisher*, *B. R. T.* 39 *Geo.* 3. 8 *T. R.* 302.]

[But if a writ of error is quashed, by reason that continuances are entered after its *teste*, it shall be without costs. *Gould v. Coulthurst*, *M.* 5 *G. Str.* 139.]

[Whether plaintiff in error shall have costs in this case, being defeated by artifice of defendant in error. *Dublin Judges divided. Ibid.*]

[If a writ of error is brought against an affirmance in *B. R.* in *Ireland*, of a judgment obtained there by defendant in prohibition, and it is quashed for defect, the defendant in error shall have costs, though none were given below either in the principal judgment or the affirmance. *Archbishop of Dublin v. Dean of Dublin*, *H.* 6 *G. Str.* 262.]

[If writ of error is quashed, because brought by one defendant, where there are two, there shall be costs. *Cooper v. Ginger*, *M.* 11 *G. Str.* 606.]

[If writ of error is quashed, because returnable before judgment given, costs shall be paid by the party who occasioned the delay. *Rejindoz v. Randolph*, *P.* 2 *G. 2. Str.* 834.]

By the *st.* 3 *Jac.* 8. and 13 *Car.* 2. 2. a writ of error shall be no *superfedeas*, unless a recognizance be given with sureties, &c. for payment of damages and costs.

And by the *st.* 13 *Car.* 2. 2. if error be brought of a judgment after a verdict, and the judgment be affirmed; the defendant in error shall have double costs.

But the defendant in error shall not have costs, where by the writ of error the execution is not delayed: as, error be sued by the plaintiff or demandant in the original action. 2 *And.* 123. *R. Cro. Car.* 401. *R.* 4 *Mod.* 7.—But now, by the *st.* 8 & 9 *W.* 3. 11. if the plaintiff or demandant, after any judgment for defendant, sue error, and afterwards discontinue, be nonsuited, or have judgment against him, the defendant or tenant shall have costs.

So, no costs, if execution be sued before error brought. *R.* 2 *Cro.* 636. *R.* 1 *Vent.* 88. 2 *And.* 123.

And if execution be executed in part, costs shall be diminished. *Cro. Car.* 175.

So, if neither damages nor costs were recovered in the original action; for then the writ of error does not delay execution.

As, in error upon a judgment in a *formedon*. *R. cont. Cro. El.* 617. *R. acc. Cro. Car.* 425.

In error upon a common recovery. *R. Ray.* 135. *R.* 1 *Lev.* 146.

So, if an executor brings error upon a judgment against his testator, and the judgment be affirmed, &c. the defendant shall not have costs. *R.* 1 *Mod.* 77. 1 *Vent.* 166.

[If executor brings error on judgment against testator on bond,
Q 4 and

and after affirmance moves to pay principal, interest, and costs, he shall not pay costs in error. *Saltern v. Wynne*, P. 10 G. 2. *Str.* 1072. *B. R. H.* 367.]

[But if executor brings error after a *devastavit*, he shall pay costs on affirmance. *Caswell v. Norman*, T. 7 G. 2. *Str.* 977.]

Or, upon a judgment against himself, as executor. *R.* 3 *Lev.* 375. 4 *Mod.* 245. *Skin.* 400. [1 *H. Bl.* 567.]

[Executors and administrators are liable to costs in error in cases where they would be liable in the original action. *Ibid.*]

And therefore, an executor or administrator does not find bail for damages and costs upon a writ of error within the *ſt.* 3 *Jac.* 8. *R.* 2 *Cro.* 350. *Bul.* 284. *Cro. Car.* 59. *Lit.* 3. 1 *Sid.* 183. *Vide Bail*, (K 3.)

So, if a plaintiff in *replevin* brings error, and judgment for the avowant be affirmed, he shall not have costs. *R.* 1 *Sal.* 205. *Carth.* 179. But this was 2 *W. & M.* before the *ſt.* 8 & 9 *W.* 3. 11. [*Vide Doug.* 709. n. 2.]

So, if judgment be reversed in error, the defendant does not pay costs in error; for the plaintiff recovers his debt and costs which he ought to have had if he had recovered before. *R.* 2 *Mod. Ca.* 314. *Wyvil v. Stapleton*, M. 11 G. *Str.* 615.

[On affirmance of judgment in a *qui tam* action, there may be costs in error, tho' there were none in the original suit. *Ferguson v. Rawlinson*, H. 11 G. 2. *Str.* 1084. *Andr.* 113.]

[On error on a bond given in *India*, B. R. will direct the damages to be computed, by adding to the costs *India* interest (9 per cent.) till signing the judgment, and legal interest (5 per cent.) from that time, on the accumulated sum ascertained by the judgment. *Bodily v. Belamy*, M. 1 G 3. 2 *B. M.* 1094. *Doug.* 752. n. 3.]

[If bail in error, on judgment affirmed and *ſci. fa.* against them, give vexatious delay, the court where the *ſci. fa.* is, will order interest from the time of the affirmance: before that, 'tis the province of the court where error is brought. *Welford v. Davidson*, T. 7 G. 3. 4 *B. M.* 2127.]

[The court of Exchequer Chamber is bound to allow *double costs* to the defendant in error, on the affirmance of a judgment of the King's Bench; but it is entirely a matter in their discretion, whether or not *interest* shall be allowed on such affirmance. *Shepherd v. Mac-kreth*, H. 34 *Geo.* 3. 2 *H. Bl.* 284.—*Vide Pleader*, (3 B 20.)]

[A bill of exceptions being no part of the record in the court below, is not to be included in the taxation of costs there. *Gardner v. Baillie*, C. P. E. 37 *Geo.* 3. 1 *Bos. & Pul. Rep.* 32.]

(C) Double, or Treble Costs.

(C 1.) By Construction.

IN all actions real, personal, or mixt, where damages are recoverable, if a subsequent statute gives double or treble damages, the costs also, as part of the damages, shall be double or treble. 2 *Inst.* 289.

As, upon the *ſt.* of *Gloc.* 5. which gives treble damages in waste against tenant by the curtesy, or in dower. *Ibid.*

Upon the *ſt.* 2 *H.* 4. 11. which gives double damages for a suit in the

the admiralty, where the cause of action arises upon the land. 10 *Ca.* 116. 1 *Rol.* 517. l. 15. *Dy.* 159. b.

Upon the *st.* 8 *H.* 6. 9. which gives treble damages for a forcible entry. 10 *Co.* 115. b. *R.* 1 *Vent.* 22.

Upon the *st.* 5 *El.* 21. which gives treble damages for hunting in a park. 4 *Leo.* 36.

Upon the *st.* 2 *W. & M.* 5. which gives treble damages and costs of suit against him who makes *rescous* of goods which are distrained for rent. *R. T.* 6 *W.* 3. inter *Sir W. Lawson and Story.* 1 *Sal.* 205. (*Vide* 1 *Ld. Ray.* 19.)

[Costs *de incremento* are to be doubled, as well as those given by the jury. *Smith v. Dunce,* T. 9 *G.* 2. *Str.* 1048.]

(C 2.) By the express Words of a Statute.

(C 2.) *Double costs.*] So, by the *st.* 2 & 3 *Ed.* 6. 13. if a suggestion for a prohibition be not proved in six months, the defendant shall have a consulation, and double costs.

But this does not extend, where the defendant does not pray a consulation for not proving the suggestion, but joins issue upon it, and a verdict is for the plaintiff; for then the defendant shall not have double costs. *R. Latch,* 140.

Nor, where a suggestion needs no proof.

So, by the *st.* 7 *Jac.* c. 5. [made perpetual by *stat.* 21 *Jac.* 1. c. 12.] in an action upon the case, or trespass in the courts at *Westminster* against a justice of peace, mayor, bailiff, headborough, portreeve, constable, tithingman, or collector of subsidy, for any thing done by virtue of their offices, the judge before whom it is tried may allow to the defendant double costs.

[In trespass against justice of peace, if plaintiff after plea moves to discontinue, the court may order double costs by rule, tho' on verdict or nonsuit it must be by suggestion. *Devenish v. Mertins,* P. 7 *G.* 2. *Str.* 974.]

[By *stat.* 11 *Geo.* 2. c. 19. s. 22. in an action of *replevin* if the plaintiff shall become nonsuit, discontinue his action, or have judgment against him, the defendant in such *replevin* shall recover double costs of suit.]

[By a canal act, the company were authorised to take certain lands for the purposes of the act, on making certain payments either by annual rents or sums in gross, and the persons from whom the land was to be taken were empowered to distrain the goods of the company, even off the premises, in case of non-payment of such sums: an avowant, stating a distress under this act of parliament, is not entitled, on obtaining a verdict, to double costs under the statute of *George.* *Leominster Can. Comp. v. Norris,* B. R. H. 38 *Geo.* 3. 7 T. R. 500. *Leominster Can. Comp. v. Cowell,* C. P. H. 38 *Geo.* 3. 1 *Bos. & Pul. Rep.* 213. S. P.]

[By *stat.* 24 *G.* 2. c. 44. in action against justice of peace, if the judge certifies that the injury was wilful and malicious, plaintiff shall have double costs.]

So, by the *st.* 21 *Jac.* 12. in an action against a churchwarden, overseer, swornmen, or any in their aid, or by their command, for any thing done in virtue of their offices.

And

And by these statutes the defendant shall have double costs upon certificate by the judge, tho' the plaintiff afterwards discontinue, or be nonsuited. *Vide the statute itself.*—So costs *de incremento* shall be double. *Per Holt, Skin. 555.*

And all the defendants shall have double costs. *Vau. 117.*

And this, tho' the declaration be insufficient. *R. Cro. Car. 175. Vide ante, (A 5.)*

Tho' it be not in trespass, &c. but in *assumpsit*, &c. for money which they took as officers. *R. Show. 215.*

But the defendant shall not have costs, if the judge does not certify that the defendant was an officer. *Cro. Car. 175. R. 2 Vent. 45. [Grindley v. Holloway, B. R. H. 20 Geo. 3. Doug. 307.]*

[*Aliter*, where a special verdict is found, whereby it appears that the defendant acted in execution of his office. *Ibid. n. 82.—Vide Harper v. Carr, B. R. M. 38 Geo. 3. 7 T. R. 448.* The certificate may be granted by the judge either at, or after, the trial. *Ibid.*]

[If plaintiff in an action of *trover* against officers is nonsuited for not shewing a title to the goods, so that no evidence of their being officers appears, a suggestion may be entered on the roll for that purpose, to entitle them to their double costs. *Barton v. Miles, T. 8 G. 2. B. R. H. 125.*]

Or, if the officer acts in a matter ecclesiastical: as, if an action upon the case be against a churchwarden for a malicious presentment for incontinence, in the spiritual court. *R. Cro. Car. 285. Jon. 305.*

Nor, in an action for neglect of his office; as, for refusal of his vote in the election of a mayor. *R. 2 Lev. 250.*

For a malicious presentment. *R. Cro. Car. 467.*

[Under 13 G. 2. c. 19. to restrain horse-races, plaintiff or informer has double costs.]

[Defendant, after verdict for plaintiff for less than 40 s. shall have leave to enter suggestion on the roll, that he resides in *Middlesex*; to entitle him to double costs under 23 G. 2. c. 33. *Fitzpatrick v. Pickering, P. 30 G. 2. 2 Wilf. 68.*]

(C 3.) *Treble.*] So, by the *fl. 8 El. 2.* if any maliciously arrests in the name of another, without his consent, in *B. R.* or the *Marsbalsea*, and be convicted, &c. he shall be imprisoned for six months without bail, and shall pay treble costs to the person arrested.

By the *fl. 43 El. 2. for Relief of the Poor*, in an action for any thing done by authority of that act, the defendant shall have treble damages and his costs, if the plaintiff be nonsuited, or has a verdict against him.

Tho' the money was not levied by distress, but voluntarily paid to the overseer, and he, who paid it, afterwards sues for the money. *R. Tel. 176.*

So, by the *fl. 2 W. & M. 5.* upon a *rescous* of a distress for rent, there shall be treble damages and costs.

So, by the *statutes for the land-tax*, if the defendant be sued as collector of the land-tax, he shall have treble costs. [*Brassey v. Dawson, T. 7 G. 2. Str. 978.*]

Tho' by another count in the same declaration, he be charged for fraud in the execution of his office, which is not within the statute. *R. Carth. 189.*

[By

[By *ſt.* 25 *G.* 3. *c.* 50. *ſ.* 28. any perſon ſued, moleſted, or proſecuted for any thing by him done in purſuance of this act, made againſt ſhooting without a certificate, having a verdict in his favour, or in caſe the plaintiff be nonſuited ſhall have treble coſts.]

[But, in this caſe treble coſts are only due where a perſon is ſued for doing any thing in putting the act in execution, not where one is ſued for offending againſt the act. 1 *Term Rep.* 252.]

And where treble damages and coſts are given, the coſts *de incremento*, as well as the damages, are treble. *R. Skin.* 555.

(C 4.) When not recovered.

But if a ſtatute gives double or treble damages, where no damages were recoverable at all, before; the plaintiff ſhall not have any coſts, 2 *Inſt.* 289. [*Cowp.* 368.] *Vide ante*, (A 2, 3.)

As, in waſte againſt tenant for life or years (until the *ſt.* 8 & 9 *W.* 3. 11. gave coſts if the ſingle value found does not exceed twenty nobles). 2 *Inſt.* 289. 2 *Sand.* 257.

In an action upon the *ſt.* 1 & 2 *P.* & *M.* 12. which gives 5 *l.* and treble damages for driving a diſtreſs out of the county. *R. Dy.* 177. *b.* 1 *Rol.* 516. *l.* 45.

In debt upon the *ſt.* 2 & 3 *Ed.* 6. 13. which gives treble damages for not ſetting out of tithes (until the *ſt.* 8 & 9 *W.* 3. 11. gave coſts where the ſingle value found does not exceed twenty nobles). *R.* 2 *Cro.* 70. *Cro. Car.* 560. *Mo.* 915.

In an action for a forcible entry, upon the *ſt.* 8 *H.* 6. 9. *Hard.* 152.

Or, for ingroſſing, upon the *ſt.* 5 & 6 *Ed.* 6. 14. *Hard.* 152.

In a *decies tantum*. *Hard.* 152.

Where the plaintiff or demandant recovers double or treble damages and coſts, it is the ſafeſt way, that the damages and coſts found by the jury be doubled or trebled; and that there be no coſts *de incremento*. 1 *Rol.* 517. *l.* 20.

And the ſingle damages found may be doubled, or trebled by the court. *R. Yel.* 176.

Yet coſts *de incremento* may be given. 1 *Rol.* 517. *l.* 25.

And coſts *de incremento* were trebled. *Cro. El.* 587.

If coſts are given by a jury, when they ought not, there ſhall be judgment without reſpect to them. *R.* 2 *Sand.* 257.

Coſts in Chancery.

Vide Chancery (2 *W.*).

C O T T A G E S.

Vide Juſtices of Peace, (B 84.)

COVENANT.

(A) When Covenant lies.

(A 1.) Upon what Deed.

COVENANT lies when a man covenants with another, by deed to do something, and does it not. *F. N. B.* 145. *A.*

Or, that he has done it; when it is not done. *Pl. Com.* 308. *a.*

And it lies upon a covenant in any deed indented, or poll. *1 Rol.* 517. *l.* 40.

So, for breaking a covenant by the lessee in the king's patent; tho' the lessee did not seal any counterpart; for his acceptance charges him. *R.* 1 *Rol.* 517. *l.* 50. *2 Cro.* 522. *R.* 2 *Cro.* 240.

So, if a lease be to *A.* and *B.* by indenture, and *A.* seals a counterpart, and *B.* agrees to the lease, but does not seal, yet *B.* may be charged for a covenant broken. *Co. L.* 231. *a.* *2 Rol.* 63.

Tho' the covenant be collateral, and not annexed to the land. *Co. L.* 231. *a.*

[A covenant to keep a house in good and sufficient repair, and so to have it, binds the covenantor to rebuild, though the house be burnt down by accident. *Chesterfield v. Bolton*, *H.* 12 *Geo.* 2. *Com.* 626. *Monk v. Cooper*, *B. R. E.* 13 *Geo.* 1. 2 *Ld. Raym.* 1477. *Str.* 763. *S. C. Belfour v. Weston*, *B. R. T.* 26 *Geo.* 3. 1 *T. R.* 310. *Doe v. Sandham*, *B. R. E.* 27 *Geo.* 3. 1 *T. R.* 710. *Bullock v. Dammitt*, *B. R. E.* 36 *Geo.* 3. 6 *T. R.* 650. *Vide Pleader*, (2 V 14.)]

So, if by charter-party made by *B.* he lets the ship to *D.*, who covenants with *B.* and *A.* the part-owners, to pay 300 *l.*, *A.* may have covenant, tho' he did not seal, but only *B.* and *D.* sealed it; for it is in the nature of a deed-poll by *D.*, in which he may covenant with a stranger to the deed, tho' he cannot in an indenture. *R.* 2 *Lev.* 74.

So, if by articles *A.* covenants generally to indemnify *B.*, he may have covenant, tho' he did not seal the articles, and the covenant was not with him. *R.* *Lut.* 305.

But covenant does not lie upon an agreement without deed; but an action upon the case. *F. N. B.* 145. *A. G.*

Yet by the custom of *London*, covenant lies without deed. *F. N. B.* 146. *A.*

So, by the custom of any other place. *1 Leo.* 2.

But such custom shall be taken strictly; for upon such a covenant an executor shall not be charged. *R.* 1 *Leo.* 2.

So, covenant cannot be for a thing present. *Pl. Com.* 308. *a.*

(A 2.) Upon what Words.

A covenant is real or personal. *F. N. B.* 145. *A.* *Co. L.* 139. *b.* *Vide Dett*, (A 8, 9.)

A covenant real is, when a man covenants to levy a fine of lands or tenements, upon which a writ of covenant shall be brought, and a fine shall be levied. *F. N. B.* 145. *A.* 146. *F.*

A covenant personal is by express words, or by a covenant in law. *Vau.* 118. *Co. L.* 139. *b.*

Any words in a deed, which shew an agreement to do a thing, make a covenant: as, if it be agreed by articles between *A.* and *B.*

that

that stock shall be in the hands of B. until a jointure be made, B. solvendo prouide the interest to A.; covenant lies against B. for the interest. R. 1 Rol. 518. l. 50. [Vide Doug. 27. 766.]

If it be said in a lease, that the lessee shall repair, and leave repaired, &c. R. 1 Rol. 518. l. 15. 2 Cro. 399.

That the lessee shall have wood, non succidendo arbores; this is a covenant by the lessee that he will not cut down trees. R. Mar. 9.

If said, I have a deed and will produce it. 2 Mod. 89. R. 1 Rol. 519. l. 10.

So, if in a demise by the king's letters patent, it is said, that the grantee shall repair; it shall be a covenant by him. R. 2 Cro. 522.

If there be a grant of an office, absque impetitione, denegatione, &c. Covenant lies if the grantee does not enjoy. R. 1 Leo. 277.

So, if it be said, that it is agreed A. shall pay 10l. to B. for his goods; this amounts to a covenant by B. to deliver his goods; for, agreed, is the word of both. R. 1 Sand. 322. 1 Sid 423. Ray. 183.

That A. shall take firebote, without cutting more than is necessary; covenant lies against A. if he cuts more. R. 1 Leo. 324.

That an apprentice shall be faithful, shall not discover the secrets of his master, &c. R. Mo. 135.

[In a common indenture of apprenticeship under 5 El. c. 4. between the father, the son, and the master; the father is answerable in covenant for what is to be performed by the son. Doug. 518.]

So, if tenant in tail leases for years, and afterwards covenants and grants that the lessee shall hold to him and his wife for the life of the lessor; this does not amount to a surrender, or confirmation to enlarge his estate, but to a covenant. R. Dy. 272. b.

If the lessee agrees, that the lessor shall have two rooms of an house, and a lease be of the house, except the two rooms, and free passage to them; if the lessor be disturbed in his passage by the lessee, covenant lies against him. R. 1 Sal. 196.

Otherwise, if disturbed in the rooms; for they were excepted. 1 Sal. 196.

If a man covenants to stand seised to the use of his son, saving that his wife shall have the loppings of trees; if the son cuts down the trees, covenant lies against him. R. Cro. Car. 437.

If by articles of agreement it is said, that it is intended a fine shall be levied; this amounts to a covenant to levy it. R. 2 Mod. 91.

If A. covenants, that B. shall take so many trees yearly, and afterwards cuts them all down; B. shall have covenant against him. Mod. 18.

So, if the words are introduced by words of condition; as, if a lease be, upon condition, that the lessee shall keep and leave the house in as good plight, &c. 40 Ed. 3. 5. b.

Or, with proviso, that if the lessee dies within forty years, his executor shall have it for so many years; this is a covenant by the lessor, that the executor shall have it. 1 Rol. 518. l. 45.

So, provided and it is agreed, that the lessor shall find timber. 1 Rol. 518. l. 20.

Provided he pay out of the first profits of an office. R. 1 Lev. 155.

So, covenant lies if an agreement appears in an obligation. Ca. Ch. 294.

So, if it be said in a deed, that an obligation is in the hand of B. and that

that I will deliver it; covenant lies for not delivering it. *R. 1 Rol. 519. l. 10.*

So, if a man gives a release for money recovered by him, and at the end of the deed mentions, *that he will not sue execution*; if he afterwards sues it, covenant lies against him upon this deed. *R. 1 Rol. 517. l. 45.*

So, if a deed be, *I oblige myself to pay at such a day*; covenant lies. *R. Hard. 178.*

So, if by writing it is agreed, *that A. shall give B. 70l. for a house*; covenant lies against B. for not conveying the house. *R. 1 Sand. 320. Ray. 183. 1 Sid. 423. 1 Lev. 274.*

That A. shall be accountable to B. for all money received. *R. 1 Lev. 47.*

So, if A. assigns and transfers money due to him from a foreign state. *R. 1 Mod. 113.*

[If one covenant with another to do a certain act, in consideration of a reward, and the other prevent the stipulated thing from being literally performed, and accept of an equivalent, he may be sued for the reward; and the reason of the non-compliance with the literal terms may be averred. *Hotham v. The East India Company, B. R. M. 20 Geo. 3. Dougl. 272.*]

[So, where something is covenanted or agreed to be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part. *Jones v. Barkley, B. R. T. 21 Geo. 3. Dougl. 684.*]

When covenant or debt lies, *vide Action, (M 4.)*

(A 3.) Upon what, not.

But where words do not amount to an agreement, covenant does not lie; as, if they are merely conditional to defeat the estate: as, a lease *provided and upon condition, that the lessee collect and pay the rents of his other houses.* *R. 1 Rol. 518. l. 30.*

So, if the words are only a qualification of the words on the other part; as, if a lessee covenants to repair, *provided that the lessor finds timber*: this is not a covenant by the lessor to find it, if there be not the word, *agreed.* *R. 1 Rol. 518. l. 25.*

If B. covenants to pay 100l. to A., and he covenants, *upon receipt to give an acquittance, and to make an obligation, &c.* it is not any covenant that he will receive and give an acquittance. *2 Dan. 231.*

So, if a deed be in the nature of a defeasance; covenant does not lie upon it, but an action upon the case: as, if by deed it be agreed, *that a statute be cancelled*, in the present tense. *Semb. 1 Sid. 48.*

So, if a mortgage be by A. to B. by a demise for years, with a proviso to be void, *if A. pay 10l. at such a day, and 410l. at such a day*, and there be a bond for performance of all covenants, payments, &c. debt does not lie, if A. does not pay, without an express covenant for payment; for the mortgage is forfeited. *Semb. 2 Mod. 36.*

So, if the mortgage was by feoffment. *R. 2 Cro. 281. Yel. 206.*

[A clause in a marriage settlement, "that the trustees should not be chargeable with or accountable for any money arising in the execution of the said trusts, but what the person or persons so to be
"account-

"accountable should actually receive," does not bind the trustees as a covenant, but is a clause of indemnity, to take away that responsibility which each would be subject to for the acts of the others, were it not for this clause; and only leaves each of them accountable for what he actually receives as for a simple contract debt. *Bartlett v. Hodgson*, B. R. M. 26 Geo. 3. 1 T. R. 42.]

(A 3.) When it lies upon a Covenant in Law.

So, some words import and make a covenant in law, tho' there be not any exprefs covenant: as, if a man, by deed demise land for years, and the lessee is ousted; covenant lies upon the word *demise*. 1 Rol. 519. F. R. 4 Co. 80. b. Dy. 257. a. R. 2 Leo. 104. Cro. El. 674. R. 2 Cro. 73. *Vide Garranty* (A).

So, if he demise, or assign, by the word, *concessit*.

So, if he demise *reddendo* rent; covenant lies for non-payment of the rent, upon the word *reddendo*. 1 Rol. 419. l. 25. 1 Sid. 266. 447.

Tho' the reservation be to a stranger. *Per Hale*, 1 Mod. 113.

So, if he convey the inheritance with warranty, and the feoffee, &c. be evicted for years; covenant lies upon the word *warrantizo*. R. 1 Rol. 519. l. 20. Yel. 139. 1 Rol. 25. R. Hob. 3.

So, it lies upon a warranty in a fine *sur concessit* for years. 2 Sand. 180. 1 Lev. 301. 1 Sid. 466.

So, it lies against a woman after the death of her husband, upon a warranty in a fine by them *sur concessit* for years. R. 1 Sand. 180. 1 Mod. 291.

So, it lies upon a warranty in law, by the word *dedi*, &c. if he be evicted for years.

Or, by the word, *dedi*, *concessit*, or *demise*, of an estate for life, tho' the eviction be only for years; for he cannot be aided by voucher, re-butter, or *warrantia charta*. R. Hob. 4.

So, covenant lies upon the word, *demise*, if the lessor had not power to demise; tho' the lessee never entred, nor was evicted. R. Hob. 12.

Tho' the lease was good only by estoppel. R. 2 Cro. 73.

So, if he demises, *reddendo* such a rent free of all taxes; covenant lies, if he does not pay it, discharged of taxes before or afterwards imposed. R. Cath. 135.

So, if a lessee for years be distrained by the lord *paramount*; he shall have covenant against him in the *mesnalty*, tho' he cannot have a writ of *mesne*. Ray. 257.

So, if a lessor does an act which destroys or defeats the effect of his grant, covenant lies against him; as, if A. grants the use of a way to B. and afterwards stops it. 1 Sand. 322.

But an exprefs covenant controls the generality of a covenant in law: and therefore, if a lessor covenants, that the lessee shall enjoy without eviction *by him or any who claim under him*; covenant does not lie upon eviction by a stranger. R. 4. Co. 80. b.

So, if a lessor covenants, that the lessee shall take estovers *by assignment*; he cannot take them without assignment. *Semb.* Dy. 19. b.

If a lessee covenants to repair at his own charges, he cannot take timber. *Vide* Dy. 198. b. 314. a.

So,

So, if goods be demised by indenture for years; if the lessee be evicted, covenant does not lie upon the word, *demise*; for the law does not create a covenant for a personal thing.

So, if *A.* demises a house, and the use of a pump; covenant does not lie, if the lessee cannot use it. *R. cont. per three J. but Twissd. acc. and the judgment was reversed.* 1 *Sand.* 322. 1 *Sid.* 430.

So, if *A.* covenants or promises by deed, to do such a thing; covenant does not lie by any one not named in the deed. *R.* 1 *Sal.* 197. [*Vide Nurse v. Frampton, B. R. E. 6 Will. 3. Salk. 214. 1 Ld. Raym. 28. S. C.*]

[But, on a promise in writing without seal, made to one person for the benefit of another, an action of assumpsit may be maintained by the person for whose benefit the promise was made. *Dutton v. Pool, B. R. M. 29 Car. 2. 1 Vent. 318. 322. Martyn v. Hind, B. R. E. 16 Geo. 3. Cowp. 437.*]

(B) By whom it lies.

(B 1.) By an Executor, or Administrator.

IF a man covenants with *B.* to do a personal thing, and *B.* dies; his executor or administrator shall have covenant upon it. *F. N. B.* 145. *D.* 146. *D. Reg.* 165. *b.*—By whom, and to whom, a condition shall be performed, *vide Condition*, (G 1, 2.—O 1, 2.) By whom debt lies, *vide Dett* (C—D.)

So, if he covenants with *B.* and does not name his executor or administrator.

So, if he covenants with *B.* his heirs and assigns, upon a grant or conveyance of an inheritance; the executor or administrator of *B.* may have covenant for damages, upon a breach in his lifetime. *R.* 1 *Vent.* 176. 347. 2 *Lev.* 26.

So, if he covenants with a bishop and his successors to repair a rectory demised; the executor of the bishop may have covenant for a breach in his lifetime. *R.* 2 *Vent.* 56.

(B 2.) By an Heir.

So, where the covenant relates to the inheritance, the heir may have an action upon it. 1 *Rol.* 520. *l.* 42.

As, if an abbot covenants with a lord of a manor to sing in his chapel, for him and his family. 42 *Ed.* 3. 3. *Dy.* 24. *a.*

If one parcener, upon partition, covenants with the other, to acquit her of a suit issuing out of the land. *R.* 42 *Ed.* 3. 3. *b.* *Vide Co. L.* 385. *a.* 5 *Co.* 18. *a.*

If a man covenants with another and his heirs, to make such an assurance. *Bend. pl.* 260. *Dy.* 338. *a.* 1 *And.* 55.

If a man covenants to convey part of lands purchased, to the heir of his coparcener. *R.* *Dy.* 338. *a.*

To leave the estate in repair at the end of the term. *R.* 2 *Lev.* 92.

Tho' the covenant be with the lessor, his executors and administrators, and does not name the heir. *R.* 2 *Lev.* 92. Where the covenant was such as runs with the land, and appears to be intended to have continuance after his death.

(B 3.)

(B 3.) By an Assignee.

So, by the common law, upon a covenant in law, the assignee of the estate shall have an action. *Dy. 257. F. N. B. 146. C. 1 Rol. 521. I. R. 4 Co. 80. b. R. 5 Co. 17. a. Mo. 419.*

So, tenant by statute-merchant, &c. who comes to the land by act of law. *5 Co. 17. a.*

So, tho' the assignment be by *parol*, where it may be good by *parol*. *Mo. 419. Cro. El. 437.*

So, upon a covenant which runs with the estate, the assignee shall have an action, tho' not named; as, if an abbot covenants to sing for *B.* and all the lords of such a manor, in his chapel there; the assignee of the manor shall have covenant. *1 Rol. 521. l. 15. 5 Co. 17. b. Co. L. 385. a.*

If one parcener covenants with the other to acquit her of a suit due on the land, the assignee of the other parcener shall have covenant. *1 Rol. 521. l. 22. 5 Co. 18. a. Co. L. 384. b. 385. a.*

If a lessee covenants to repair; the assignee of the reversion shall have covenant. *R. 1 Lev. 109. R. 3 Lev. 326. Adm. 1 Sal. 317.*

So, if he be named, the assignee shall have covenant by the common law, upon a covenant, which relates to the inheritance: as, if a man covenants with a purchaser, his heirs and assigns, to make further assurance, &c. *R. 1 Rol. 521. l. 25. R. Cro. Car. 503.*

If he covenants with a lessee, his executors and assigns, that he shall retain out of his rent. *Semb. Cro. Car. 137.*

And now, by the *st. 32 H. 8. 34.* patentees of the king, and grantees or assignees of reversion from the king, or any other, may maintain actions for not performing the covenants, &c. expressed in their leases, against the lessees, their executors, administrators, or assigns, as the grantors might have done. *Vide Condition, (O 2.)*

[It is extremely well settled at common law, without referring to this statute, that covenants which run with the land will pass to the person to whom the land descends. *Per Lord Kenyon C. J. Webb v. Russell, B. R. T. 29 Geo. 3. 3 T. R. 401.*

And thereupon the patentee of the king (as the king himself) shall have covenant against the lessee, his executor or assignee. *R. 2 Rol. 64.*

Tho' he be assignee of the reversion only for years. *R. Cro. El. 600. 617.*

So, covenant lies by an assignee, against the lessee or his executor for rent due after the assignment of the term, and acceptance of rent from the assignee. *R. 3 Lev. 233. R. 2 Rol. 64. Vide post. (C 1.)*

So, it lies by an assignee of part of the estate demised. *Semb. 1 Lev. 250.*

Or, the assignees of several parts may join. *R. 1 Lev. 109. 1 Sid. 157. Ray. 80.*

And tho' the lessee did not covenant with the lessor and his heirs and assigns, but only with the lessor, his executors and assigns; yet the assignee of the reversion, being entitled to the rent, shall have covenant for it, as incident. *Per Hale, 2 Sand. 371.*

Or, covenanted with the lessor and his heirs, without naming assigns. *R. Mo. 27. 159. 242. 1 Lev. 109. 1 Sid. 157.*

So, if a woman lessee takes husband, the husband shall have covenant upon a covenant in law. *R. 5 Co. 17. a.*

Or, upon any express covenant by the lessor. *5 Co. 17. a.*

So, tenant by statute, *elegit*, &c. tho' he comes to the land by act of law. *Ibid.*

And, where an assignee shall have covenant, it extends to an assignee in fact, or in law.

And to an assignee of an assignee, *toties quoties*. *5 Co. 17. b.*

And to the executor or administrator of an assignee; or the assignee of an executor or administrator. *Ibid.*

And covenant lies by an assignee, upon every covenant, which concerns the land; as, to pay rent, not to do waste, &c. *Vide Condition, (O 1, 2.)*

So, upon a covenant to leave the lands in good repair at the end of the term. *R. Cro. El. 600.*

To make a wall upon the land. *R. Mo. 159.*

To enter to view the repairs. *1 Leo. 62.*

To make a new lease at the expiration of the first. *Mo. 159.*

But the *st. 32 H. 8. 34.* does not extend to collateral covenants, which do not concern the land demised: and, therefore the assignee shall not have covenant for a collateral covenant broken. *5 Co. 11. a. Vide Condition, (O 1, 2.)*

Nor, if a covenant be contingent, or upon a possibility: as, that if the lessor upon his view finds the lands, &c. well repaired at the end of the term, he will make a new lease. *R. per three J. Mo. 27.*

So, an assignee of an apprentice by the custom of London, shall not have covenant upon the original indenture. *R. Sho. 4.*

So, an assignee of a lease, which appears to be good only by estoppel, shall not have covenant. *R. Cro. El. 437. Mo. 419.*

So, covenant does not lie by an assignee, for a breach done before his time.

Yet where a breach is continuing, it shall be otherwise: as, if a covenant be to repair within such a time after notice; if the lessee does not repair upon notice by the assignee, covenant lies, tho' it was out of repair before the assignment. *R. Mo. 242.*

So, covenant lies by an infant against a man of full age; tho' there are mutual covenants, and the covenant by the infant does not bind. *R. 1 Sid. 446. Vide Action upon the Case, (B 14.)*

But covenant does not lie by the covenantee, after his assignment of the reversion. *D. 3 Lev. 154. Vide Dett (D).*

[If mortgagor and mortgagee make a lease, in which the covenants for the rent and repairs are only with the mortgagor and his assigns; the assignee of the mortgagee cannot maintain an action for the breach of these covenants because they are collateral to his grantor's interest in the land, and do not run with it. *Webb v. Russell, B. R. T. 29 Geo. 3. 3 T. R. 393.*]

[So, if tenant for a term of years lease for a less term, and assign his reversion, and the assignee take a conveyance of the fee, by which his former reversionary interest is merged, the covenants incident to that reversionary interest are thereby extinguished. *Ibid.*]

[But nothing is clearer than that a term which is taken *in alieno jure* is not merged in a reversion acquired *suo jure*. *Per Ld. Kenyon C. J. Ibid. 401.*]

[If tenant for a term convey the term by way of mortgage, and then join with the mortgagee in a lease for a shorter term, in which the covenants for the rent and repairs are only with the mortgagor and his assigns, and the interests of the mortgagor and mortgagee become extinguished during the lease, by the reversioner acquiring their estates, still the mortgagor may maintain an action of covenant against the lessee, the covenants being in gross. *Stokes v. Russell*, B.R. T. 30 Geo. 3. 3 T.R. 678.]

(C) Against whom it lies.

(C 1.) Against an Executor, or Administrator.

SO, if a man covenants with B. and dies, an action lies against his executor or administrator upon it, tho' he be not named in the covenant. 1 *Rol.* 519. l. 35. 40. *Dy.* 14. a. *Dub. Dy.* 114. a. *Cro. El.* 553.

So, in all cases, an executor is bound by a covenant, if it does not determine by the death of the covenantor. 1 *Rol.* 519. l. 33. 2 *Mod.* 269.

So, if he covenants for him and his assigns: for an executor or administrator is an assignee. *R. Mo.* 44.

[So, covenant lies against an administrator of a term or for a breach of covenant in not repairing in his own time, and judgment shall be *de bonis propriis*. *Ld. Raym.* 554.]

But it does not lie upon a covenant in law not broken until the death of the covenantor. *R. Dy.* 257. a.

Nor, if a covenant be for a personal act of the testator, if the breach be not in his lifetime.

[Therefore, if A. covenant, in consideration of a weekly payment to him and his executors during his own and his wife's life, he will not exercise a particular trade, the executors are not bound to abstain from exercising that trade. 2 *Bl. Rep.* 856.]

So, if a man covenants for him, his executors and assigns; covenant lies against him, or his executor, for a breach done after assignment of his term to another, and acceptance of rent from the assignee. *R.* 2 *Cro.* 309. *R.* 2 *Cro.* 522. 1 *Rol.* 522. l. 15. 30. *R. Cro. Car.* 188. 580. *Vide ante*, (B 3.)

And this, upon all covenants in fact, tho' it might be brought against the assignee; for the covenantee has an election, in covenants which bind the assignee, to charge him or the covenantor himself, tho' he has accepted rent from the assignee. *R. Jon.* 223.

But upon a covenant in law, after assignment of the term, and acceptance of rent from the assignee, covenant does not lie against the assignor. *Jon.* 223. 1 *Sid.* 447.

[Against the executor of a joint-lessee, if the covenant is joint and several, even tho' he died before the term commenced, and the whole term, interest, and benefit survive to the other lessee. *Enys v. Donningthorne*, T. 1 G. 3. 2 *B. M.* 1190.]

[If a fine be levied of a *feme covert's* estate, with a joint power to husband and wife to declare the uses; and the uses be declared by the husband and wife, in remainder to A. If the husband make a lease and covenant for quiet possession against any person claiming under him,

him, and *A.* evict the tenant after the husband's death, his executor shall be liable in an action of covenant by the tenant. *Doug.* 43.]

(C 2.) Against an Heir.

So, if he covenants for him and his heirs, covenant lies against the heir. *Lut.* 287.

So, if tenant in fee leases for years, and covenants for enjoyment, and the lessee is ousted by his heir; covenant lies against the heir, in respect of the privity, tho' he be not named. *Semb. Dy.* 257. *b.*

So, if a lease be by the word, *demise*. 2 *Leo.* 104.

[In covenant, which runs with the land, evidence that the defendant is in as heir, will support a declaration charging him as assignee. *Derisley v. Cusance*, *B. R. M.* 31 *Geo.* 3. 4 *T. R.* 75.]

(C 3.) Or an Assignee.

So, if a man covenants to do a thing, which has existence at the time of the demise, and relates to it; the covenant runs with the land, and binds the assignee, tho' he be not named; as, if he covenants to pay the rent reserved.

[A covenant in a lease that a lessee, his executors and administrators, shall constantly *reside upon the demised premises* during the demise, is binding on the assignee of the lessee, though he be not named. *Tatem v. Chaplin*, *C. P. E.* 33 *Geo.* 3. 2 *H. Bl.* 133.]

To repair the house demised. *R.* 5 *Co.* 16. *b.* 17. *b.* *R.* 5 *Co.* 24. *a. b.* *Dy.* 13. *b. in marg.* *R. Cro. El.* 457. 552. *R.* 1 *Roll.* 521. *l.* 37.

To discharge the lessor of all charges ordinary and extraordinary. *5 Co.* 24. *b.*

To permit the lessor to have free passage to two rooms excepted by the demise. *R.* 1 *Sal.* 196.

To leave so many acres yearly *sine cultura*. *R.* 2 *Cro.* 125.

So, if a man covenants to do a thing which relates to a demise, and covenants for him and his assigns expressly; this binds his assignee, tho' the thing had not existence at the time; as, if a lessee covenants for him and his assigns to build a new wall upon the land. *R.* 5 *Co.* 16. *b.*

[Covenant from lessee of tithes for himself or assigns not to let the farmers have their tithes, runs with the tithes and binds the assignee. *Bally v. Wells*, *M.* 10 *G.* 3. 3 *Wils.* 25.]

So, covenant lies against an assignee of part of an estate in lease, for a breach on his part. *R.* 1 *Roll.* 522. *l.* 5. *Cro. Car.* 222. *Jon.* 245.

So, if a man covenants for him and his assigns, so long as they shall be in possession; covenant lies against the assignee, if he continues in possession after the term expired, tho' he be not strictly an assignee. *Semb. Sti.* 407.

So, if an assignee of a term covenants for him and his executors, the executor may be charged as assignee. 1 *Sal.* 317.

But if a man covenants for him and his assigns to do a collateral thing, which does not concern the land, the assignee shall not be charged for it: as, if a lessee covenants to build a house upon other land of the lessor. *R.* 5 *Co.* 16. *b.* *Jon.* 223. *Vide Condition*, (O 1, 2.)
If

If a lessee covenants for him and his assigns to pay money to a stranger. 5 Co. 16. b.

Or, a collateral sum to the lessor himself. *Ibid.*

So, if goods are demised, and the lessee covenants for him and his assigns, to leave them in as good plight, or to pay so much for them; covenant does not lie against the assignee of the goods; for there wants the privity between him and the lessor, which there is when land is demised. R. 5 Co. 16. b.

So, if land be demised with stock, &c. and the lessee covenants for him and his assigns, to deliver the stock at the end of the term; covenant does not lie against the assignee, for the covenant is merely personal, tho' the rent was increased in respect of the stock. 5 Co. 17. a.

So, if a grantor of a rent-charge covenants to pay it free from taxes; covenant does not lie by the heir of the grantee, against the assignee or lessee of the land. R. 1 Sal. 198.

So, if a bishop covenants for him and his successors, the successor shall not be bound but only to the covenant usual in former leases. R. 2 Lev. 68. 1 Vent. 223.

So, if a lessee covenants for him and his assigns to pay rent, and he assigns to B. and the lessor accepts the rent of B. who afterwards assigns to C. Covenant does not lie against B. for rent incurred after the assignment to C. tho' the lessor had no notice of the assignment. R. cont. per two J. in C. B. but the judgment was reversed in B. R. inter Pitcher and Tovy. 4 Mod. 71. 3 Lev. 295. Carth. 177. [unless it be averred that the assignment was fraudulent. Doug. 462. n.] *Vide Dett (E).*

[And although it be stated in the declaration that the lessor was a party executing the assignment, and agreed thereby that the term, which was determinable at his option, should be absolute. *Chancellor v. Poole, B. R. T. 21 Geo. 3. Doug. 764.*]

[An assignee is liable only from the privity of contract, and must be charged according to the truth of the case, and therefore, when in covenant, the plaintiff declared against the defendant as assignee of all the estate, &c. in the premises, and it appeared in evidence that he was assignee of part only, the court held it to be a fatal variance, and the plaintiff was nonsuited. *Hare v. Cator, B. R. E. 18 Geo. 3. Cowp. 766.*]

[But the grantee of a reversion may bring debt against the original lessee for the whole rent, although such lessee hath assigned over part of the premises, because the privity of contract for the whole remains against the lessee. *Broom v. Hore, Cro. Eliz. 633.*]

[But it lies against the assignee under an absolute indefeasible assignment of the whole interest in the term even before he take possession. *Doug. 461 to 463. n.*]

[But not against a mortgagee of the term, even after the mortgage is forfeited, till he take actual possession. *Doug. 455.*]

So, if a covenant be to build a house before Michaelmas and after Michaelmas he assigns to B. covenant does not lie against B. for it was broken before the assignment. R. 1 Sal. 199.

[So, if lessee covenants to pull down old houses, and build new on the ground within seven years, and does not, but after seven years assigns; assignee is not liable. *Saint Saviour's v. Smith, H. 2 G 3. 3 B. M. 1271. 1 Bl. Rep. 351.*]

[If the *whole* of a term is made over by the *lessee*, though in the deed he reserve the *rent*, and a power of entry for non-payment, to *himself*, instead of the original *lessor*, the person to whom it is made over may sue the original lessor, or his assignee of the *reversion*, or be sued by them as *assignee* of the term, on the respective covenants in the original lease. *Doug.* 187, 188. *n.*]

[But an under-tenant, who has not the whole term, cannot be sued as assignee. *Doug.* 183 to 187.]

[If lessee for years covenant that he, his executors or administrators, shall not assign without consent in writing, and become bankrupt; the covenant does not bind the assignees under the commission, in case they make a *fair* assignment. *Ambler*, 480.]

[A covenant in a lease not to assign or underlet without leave of the landlord in writing is a *fair* and *usual* covenant. *Morgan v. Slaughter*, B.R. E. 33 Geo. 3. *Esp. Caf.* 8.]

For pleading in a writ of covenant, *vide Pleader*, (2 V 1, &c.)

(D) Covenant, how expounded.

(D 1.) In regard to the Context.

A Covenant shall be expounded with regard to the context, and intent of the deed; and therefore, if *A.* conveys a third part of his estate to *B.* for the life of another, and covenants to do any act, &c. for the better assurance of his estate to *B.* such covenant extends only to the better assurance of the said third part to *B.* for the life of the other. *R. Heb.* 275. *Vide Parols*, (A 18.)

If a covenant be, that a jointure is, and shall continue of such a value, notwithstanding any act by him, the words, *notwithstanding any act*, extend to the value at the time of the jointure, as well as to the continuance. *R. Cro. El.* 43.

If, upon the marriage of his daughter, a man covenants to pay to husband and wife 20*l.* *per ann.* it shall be understood, *for their lives*. *R. 1 Sid.* 151.

If a deed recites legacies of 50*l.* given to *A.*, *C.*, and *D.*, and thereupon it is covenanted to pay to *A.*, *B.*, *C.*, and *D.* the legacies and sums aforesaid; he is not bound to pay 50*l.* to *B.* to whom no legacy was given. *R. 2 Vent.* 140.

If a mortgage is made, upon condition to be void upon payment at such a day, and there be a covenant or obligation to perform all covenants and conditions in the deed of mortgage, an action lies if he do not pay at the day in the condition. *R. 2 Lev.* 116.

[If *A.* demise to *B.* for lives with *covenant to renew*, on the death of every life, *under the same rent and covenants*, this shall be taken as a perpetual covenant of renewal. *Cowp.* 819.]

[If *A.* demises land to *B.* who by deed-poll, covenants, that if *A.* should give him possession of a piece of ground adjoining, or if he should by any ways have possession thereof, he should pay for the demised premises and the said ground an additional rent; if *B.* gets possession of said adjoining ground he shall pay the additional rent, tho' it was by lease from a third person. *Heath v. Baker*, M. 10 G. 2. B. R. H. 319.]

[In a building and repairing lease, a covenant to *leave* the demised premises,

premises, with all new erections well repaired, extends to new erections only, if a sum is agreed to be laid out in new erections and rebuilding, and the *covenant to keep in repair* extends to new erections only: *Lant v. Norris*, P. 30 G. 2. 1 B. M. 287.]

[Under a covenant in a building lease by the tenant to pay all the taxes, (except the land-tax,) the landlord is to pay only the old land-tax, and not the additional land-tax occasioned by the improvement of the estate. *Hyde v. Hill*, B. R. T. 29 Geo. 3. 3 T. R. 377.]

[In covenant on a charter-party, by which it was agreed to employ a ship of which the plaintiff was the captor, *as soon as condemnation should have passed*, the sentence must be taken to mean a legal sentence; and the party who sues for the freight must aver that the ship was condemned by a court having competent jurisdiction. 1 Term Rep. 674.]

[In covenant on a charter-party, in which the defendants covenanted to pay so much for freight for "goods delivered at A." freight cannot be recovered *pro rata itineris*, if the ship be wrecked at B. before her arrival at A., though the defendant accept his goods at B. *Cook v. Jennings*, B. R. M. 38 Geo. 3. 7 T. R. 381.]

[Perhaps an action of *assumpsit* on a *quantum meruit* might have been maintained. *Semb. ibid.*]

(D 2.) To Synonymous, and other Words.

So, distinct covenants shall be expounded with regard to covenants synonymous, or of the same nature, in the same deed: as, if a man covenants that notwithstanding any act by him, he is seised in fee; that he has power to sell; the last shall be expounded, that he has done nothing to defeat his power to sell, tho' it be distinct from the first. *Semb. per three J. 3 Lev. 46.*

So, a covenant shall be construed according to the import of the words: as, if a lessor covenants, that the lessee shall enjoy without interruption, except by the king, his heirs or successors; an interruption by a patentee shall be a breach, for he is not excepted. R. Cro. El. 517. 8. *Vide Condition*, (E—G 12, &c.—M 1, &c.)

If a covenant be, that he shall not be evicted during the term; if the lease be by indenture 1st May for nine years next, an eviction after the lease commenced in computation will be a breach, tho' it was before the delivery. R. 1 Sid. 374.

If a condition of an obligation be, that he permit his wife to devise 100*l.* to be paid out of his personal estate, &c. he ought not only to permit the devise, but to pay the legacy. R. per three J. 2 Rol. 247. l. 50.

Covenant that he will not interrupt B. in the enjoyment of a close; if he erects a gate which interrupts, it will be a breach, tho' he has a right to erect it. R. 2 Mod. Ca. 319.

If a joint-tenant grants *totum statum* in a mill (by which a moiety passes) and the survivor, supposing that he has the whole by survivorship, grants *totum molendinum*, with a covenant that the lessee shall enjoy without interruption by him; it will be a breach, for the covenant extends to the whole mill. R. 2 Cro. 233.

So, the words of a covenant shall be restrained to the meaning of the phrase at the time of the covenant: as, if a bishop, anno 1635,

covenants to pay all taxes during the term; this shall be restrained to synodals, &c. then usually paid, and does not extend to taxes by parliament, *anno 1665. R. 2 Lev. 68.*

If a lessor covenants to indemnify the lessee from all duties, charges, and taxes to be imposed on the land, except tithes; it does not extend to the poor's rate, which is not a charge upon the land, but upon the person in respect of his ability. *R. F. g. 297.*

But a covenant to pay so much clear of all taxes extends to parliamentary taxes. *R. per three J. Holt cont. 1 Sal. 221.*

And the words of a covenant shall not be extended to things of common right, if they be otherwise satisfied: as, a covenant, that land shall be discharged of all rents, does not extend to a rent-service.

3 Leo. 44.

So, restrictive words in the beginning or end of a sentence, which in good sense may be applied to several sentences, shall extend to them all. *1 Sand. 60.*

But several and distinct covenants shall not be restrained the one by the other: as, if *B.* covenants, that notwithstanding any act by him, he has good power to convey for a jointure, and that the lands conveyed are of the value of 200 *l.*; the latter covenant is absolute, and not restrained to any act by him. *R. Jon. 403. Lit. 185. in marg.*

If *A.* covenants with his lessor, that he will pull down three messuages, and erect three new ones, and that he *omnia messuagia fore erect.* will leave well repaired at the end of the term; if he erects four messuages where he pulled down the three, he ought to leave the four well repaired: for the latter covenant is distinct, and not restrained by the former. *R. 2 Vent. 128. 3 Lev. 265.*

If a covenant be, upon reasonable request to surrender such an estate to *B.* and also to permit him to enjoy the profits: he ought to permit the taking of the profits, without request, for they are distinct clauses. *R. 2 Rol. 248. l. 50.*

If *A.* covenants, that he has a good estate in fee, and that he has power to convey notwithstanding any act by him, &c. the former covenant, *that he has a good estate*, is not restrained by the words, *notwithstanding any act.* *R. 2 Rol. 250. l. 5.*

So, tho' the covenants are not distinguished by distinct clauses, if they be several in their nature: as, if a lease for years, if *A.*, *B.*, and *C.* so long live, be assigned to *D.* with a covenant, that he has a sufficient estate for the residue of the term, *if A., B., and C. shall so long live, and they are yet in life*; tho' he does not say, *and that they are*, &c. yet it is a distinct covenant, and it will be a breach if any of them was dead. *R. 2 Rol. 249. l. 10.*

If *A.* covenants that he and his wife will levy a fine to *B.* and *C.* and their heirs, and at their charges; the latter words make a distinct covenant, for *A.* cannot covenant to levy a fine at the charge of the conusees. *R. 2 Rol. 251. l. 5.*

So, words in the middle of a sentence cannot in good sense be extended to other sentences: as, if *A.* covenants to deliver a terrier of his lands, and to make oath upon request of the truth, of it, and to deliver the original lease; there is no need of a request for the delivery of the lease. *R. 2 Rol. 250. l. 10.*

[General words at the beginning of covenants by the lessees, "jointly and severally in manner following," extend to all the subsequent

frequent covenants. *Duke of Northumberland v. Errington, B. R. H. 34 Geo. 3. 5 T. R. 522.*]

[Two several tenants of a farm agreed with the succeeding tenant to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to perform the award; the arbitrator awarded each of the two to pay a certain sum to the third; and it was holden that they were jointly responsible for the sum awarded to be paid by each. *Mansell v. Burridge, B. R. T. 37 Geo. 3. 7 T. R. 352.*]

[Deeds have always been construed more strictly than wills. *3 T. R. 765.*]

[Stops are never inserted in acts of parliament or in deeds, but the courts of law in construing them, must read them with such stops as will give effect to the whole. *Per Ld. Kenyon C. J. Doe v. Martin, B. R. M. 31 Geo. 3. 4 T. R. 66.*]

[Where several persons covenant severally in respect of a joint interest, the covenant is joint notwithstanding the words *cum quolibet eorum*. *Johnson v. Wilson, C. P. H. 14 Geo. 2. Willes, 248. 7 Mod. 345. S. C.*]

(E) Breach of Covenant.

(E 1.) What shall be.

WHAT shall be a breach of a covenant to make assurance. *Vide Condition (H).*

What, a breach of a covenant to keep indemnified. *Vide Condition (I).*

Of a covenant for enjoyment, without interruption or molestation, it shall be a breach, if the covenantor prosecutes him in a court of equity. *R. cont. Mo. 859. Semb. 2 Vent. 213. Vide Condition (M 1.—Q).*

If the covenantor himself wrongfully disturbs him. *Vide Condition, (G 12.—M 1.)*

Otherwise, if a stranger interrupts wrongfully, without title. *Vide Condition (E).*

[In a lease, the lessor reserved a right of entring and cutting timber, making reasonable satisfaction to the lessee for any damage thereby occasioned to him; covenant does not lie by such lessee for any wrongful act of cutting down by a third person, if done without the consent or authority of the lessor, however he might afterwards countenance the act. *Griffiths v. Brome, B. R. M. 35 Geo. 3. 6 T. R. 66.*]

If a lessor covenants with the lessee, that the land shall continue to him of the value of 200 *l.* during the term; it will be a breach, if the lessor ousts him, for then it cannot continue of such value. *R. Jon. 360.*

If a husband seised in right of his wife covenants, that he and his wife have a right to assure, it shall be a breach, if the wife be within age. *R. 2 Jon. 195, 6.*

So, if a covenant be to convey free from incumbrances; it shall be a breach if he makes a fraudulent conveyance, tho' it is void as to a purchaser by the *st. 27 El. 4. R. 2 Cro. 131.*

So, if it be, that the land is free from all incumbrances; a grant by copy of the same land will be a breach. *Sav. 74.* So,

So, if a covenant be, that land shall be *clare exonerata ab omnibus prioribus titulis jur. & oneribus*, &c. if there was a former lease to the feoffee *quamdiu sola manserit*, and that if she married, her son should have it; if the feoffee marries, and the son enters, it shall be a breach of covenant, tho' the charge was future and contingent. *R. 1 Leo. 93.*

So, if a covenant be, that the land is discharged, and a rent-charge was before granted to commence at a day to come. *1 Leo. 93.*

[If a master of a ship covenant to go to a certain place, there to receive a merchant's goods, provided, that if his ship should not be arrived there before *such a day*, it shall be at the merchant's option to load the ship or not; it shall be a breach in the master not to go, notwithstanding the proviso. *3 Bur. 1637.*]

(E 2.) *If the thing be prejudiced before performance.*] If a man acts contrary to the intention of the covenant, it shall be a breach, tho' he performs the words of the covenant: as, if a covenant be to deliver a recognizance to be cancelled; it is a breach if he extends it before, tho' it be afterwards cancelled. *R. Ray. 25. 1 Sid. 48. Vide Condition, (M 1.)*

If a brewer covenants to deliver all his grains for the cattle of the plaintiff; and he puts hops to them before delivery. *R. Ray. 464.*

If a man covenants to leave all the trees upon the land; and he cuts them down, and leaves them there. *Ray. 464.*

So, it shall be a breach of covenant, if the covenantor be disabled to perform. *Vide Condition, (M 2, &c.)*

(E 3.) What not.

But a covenant shall not be broken, if a man does an act, which by consequence may be a breach, if the breach does not actually follow: as, if *A.* covenants to maintain every action in her name, without release or countermand; if *A.* after an action commenced takes husband, it is not a breach, tho' the writ be abateable, if it be not abated by judgment. *R. 1 Leo. 169.*

If *A.* covenants that *B.* shall enjoy a lease assigned, free from arrears of rent; if rent be in arrear, it shall not be a breach, where no damage accrues thereby to *B.* by suit, or otherwise. *R. 1 Sal. 196.*

So, if an obligation be, to indemnify from rent in arrear, or money due by obligation, after the arrears incurred, or the obligation broken. *1 Sal. 197.*

So, a collateral thing shall not be a breach, tho' it be within the words of the covenant: as, if *A.* covenants that *B.* shall enjoy without any molestation; a suit in *Chancery* against him to stay waste is no breach, tho' the bill be dismissed; for it is a collateral thing. *R. 2 Vent. 214.*

So, a covenant shall not be broken by a subsequent act, to which the words do not extend: as, if a covenant be, that *A.* shall enjoy free from prior incumbrances, except estates for the life of *B.*, and *B.* afterwards grants by copy for three lives, for, tho' this extends beyond the life of *B.* it is not a prior incumbrance. *R. Sav. 74.*

So, a covenant shall not be broken by a thing which happens by the act of God, if it be repaired in convenient time: as, if a lessee covenants to repair a wall against a river, so that a meadow shall not be

be overflowed; if by an outrageous and sudden flood the wall be thrown down and the meadow overflowed, it is not a breach, if it be repaired in due time. *Per two J. Dy. 33. a.*

[So, where a covenant is merely negative and passive, some act must be done to constitute a breach; as non-feazance only is not sufficient. *1 Rol. Abr. 425. pl. 45. 1 Rol. 430. pl. 16. 3 Leo. 38.*]

[Therefore, where defendant had covenanted to permit the plaintiff in the last year of the term to sow clover, among the barley and oats sown by the defendant; and the latter sowed barley and oats the last year, *but gave no notice to the plaintiff*, this was held no breach. *Doug. 125.*]

[Where lessee has covenanted not to assign, set over, or otherwise put away the lease or premises demised, it is no breach, to make an under-lease of part of the term. *2 Bl. Rep. 766. 3 Wils. 234.*]

So, a covenant to do an unlawful thing shall be void: as, to permit his escape. *Hob. 14.*

To indemnify from an escape, which he has permitted. *Ibid.*

[The lessee of a coal-mine, who covenants to pay a certain share of all such sums of money as the coal shall sell for at the pit's mouth, is not liable under that covenant to pay to the lessor any part of that money, which may be produced by sale of the coals elsewhere than at the pit's mouth. *Clifton v. Walmesley, B. R. E. 34 Geo. 3. 5 T. R. 564. Gerrard v. Clifton, B. R. T. 38 Geo. 3. 7 T. R. 676.*]

[If the breach of a covenant be assigned thus; "that the defendant has not used the farm in an husbandlike manner, *but on the contrary has committed waste*," the plaintiff cannot give evidence of the defendant's using the farm in an unhusbandlike manner, if it do not amount to *waste*. *Harris v. Mantle, B. R. T. 29 Geo. 3. 3 T. R. 307.*]

(F) Covenant, how defeated.

IF the foundation of the covenant fails, the covenant also fails: as, if a lease be agreed on and the lessee executes his part, but the lessor does not execute his part, whereby there is not any lease; the covenants in the indenture sealed by the lessee, and also the bond for performance of covenants, are void. *R. Yel. 18.*

So, if a lease be made, and afterwards surrendered, the covenants contained in the lease become void. *Yel. 19.*

So, if a lease be void, the covenants contained in the lease, and the bond to perform the covenants, are also void: as, if a man grants so much of a term as shall be at his death, and the grantee assigns it; the grant being void for uncertainty, the covenants in the assignment are also void. *R. Ray. 27. R. 3 Lev. 193. 1 Lev. 45.*

[So, if the committee of a lunatic make a lease, the covenants are void, for he cannot make a lease. *2 Wils. 130.*]

[So, if a lease be executed by tenant for life, the reversioner, who is then under age being named therein, but not executing it, it shall be void on the death of tenant for life, and an execution afterwards by the reversioner, is no confirmation, so as to bind the lessee in an action of covenant. *1 Term Rep. 86.*]

So, if tenant for life, or in tail, leases for twenty years, and covenants by *demise*, and dies within the term, covenant does not lie. *R. 1 Leo. 179.*

So,

So, if a lease be extended for the king's debt, a covenant to pay the rent to the lessor is void. *Sav.* 132.

If a lessor ousts his lessee, he shall not have covenant against him for the rent.

Nor against *A.* who gave a bond, that the lessee should pay for the occupation of the lands. *R.* 3 *Leo.* 159.

So, if an obligation be for performance of such and such covenants in an indenture, part of which are void by the *st.* 5 *Ed.* 6. 16. against buying offices; an action does not lie, for, tho' part of the covenants may be lawful, the obligation shall be void for the whole. *R.* *Cro. El.* 529.

So, in all cases, where part of the condition is void by statute. *R.* *Hob.* 14.

[A covenant not to marry any other woman, and if he does, to pay plaintiff 1000 *l.* is a restraint of marriage, illegal and void; and if on plea of *non est factum*, there is verdict for plaintiff, judgment shall be arrested. *Lowe v. Peers*, *P.* 8 *G.* 3. *Affirmed in Exchequer-Chamber*, *P.* 1770, 4 *B. M.* 2225.]

But where part is void by the common law, and other part is good, the obligation shall be good. *R.* *Hob.* 14. *Mo.* 856. *R.* *Cart.* 230.

But if a lease becomes void, covenant lies for a covenant broken before: as, if a lease be upon condition to be void for non-payment of rent; an action lies for rent due before. *Cro. El.* 78. *R.* *Cro. El.* 244.

So, if a parson makes a lease, and afterwards becomes non-resident, he shall have covenant for a breach before. *Cro. El.* 78. 245. *Dub. Dy.* 373. *a. but there acc. per Nich. in marg.*

So, covenant lies for a breach in non-performance of a thing, which makes the lease void; as, if a man covenants by indenture to give a bond, &c. *Proviso that upon failure the indenture shall be thenceforth void*; covenant lies for not giving the bond, for the intent was, that it should be void as to all covenants *in futuro*. *R.* *Cro. El.* 77.

So, if a lease be void, covenant lies upon a collateral thing: as, if a dean and chapter lease to *A.* and afterwards lease to *B.*, and covenant, that they have power to lease; covenant lies, tho' the lease to *B.* was void, for it was broken immediately by the making of the lease. *R.* *Ow.* 136. 2 *Dan.* 228. 1 *Brownl.* 21.

So, covenant that the lessee shall enjoy, shall be indemnified, &c. *Ow.* 136.

So, if a bargain and sale be to *A.* and his heirs, upon condition to be void, upon payment by the bargainor of so much money, and he covenants that he will pay; tho' the deed be void for not inrolling within six months, *A.* shall have covenant for non-payment of the money. *R.* *Sal.* 199.

So, if there be a covenant to do a lawful thing, and afterwards by act of parliament the thing be prohibited, the covenant shall be defeated. *R.* 1 *Sal.* 198. *R.* *cont.* 3 *Mod.* 39.

So, if a covenant be, that he will not do, what a statute afterwards requires him to do. 1 *Sal.* 198.

But if a covenant be, that he will not do a thing then unlawful, tho' a statute afterwards makes the thing lawful, the covenant is not repealed. 1 *Sal.* 198.

So, if a covenant be to find eight men to grind at a mill, and that
the

the lessee shall deduct it out of his rent; if the lessee makes it a horse-mill, by this alteration the covenant is discharged. *R. 2 Cro. 182.*

[If *A.* and *B.* covenant in a lease for 61 years, that at any time within one year, after the expiration of 20 years of the said term of 61 years, on the request of the lessee, and his paying 6 *l.* to the lessors, they would execute another lease of the premises to the lessee, for and during the further term of 20 years to commence from and after the expiration of the said term of 61 years, &c. And so in like manner, at the end and expiration of every 20 years, during the said term of 61 years, for the like consideration, and on the like request, would execute another lease for the further term of 20 years, to commence at, and from the expiration of the term then last before mentioned, &c. under this covenant, the lessee cannot claim a further term of 20 years in the lease, if he have omitted to claim a further term, at the end of the first and second 20 years of the lease. *1 Term Rep. 229.*]

[A perpetual covenant, never to take advantage of a covenant, is a release for avoiding a circuitry of action. *1 Ld. Raym. 420. 690.*]

(G) Covenant to stand seised.

(G 1.) When it shall be good.

IF a man covenants or agrees for him and his heirs, with another and his heirs, that upon such consideration the other shall have his lands or tenements; tho' the land does not pass for want of livery, &c. yet the covenantee shall have the use and profits, and now the possession is executed to the use by the *st. 27 H. 8. 10. Pl. Com. 301. b. 303. a. Vide Bargain and Sale, (B 1, &c.)*

Tho' he covenants, that at a future day, as next *Easter*, &c. he will stand seised. *R. 2 Cro. 180. Vide Uses.*

Tho' the covenantor was seised only in reversion, or remainder. *2 Co. 15. a.*

But such covenant ought to be by deed; for an use shall not be raised by *parol.* *Adm. cont. Pl. Com. 303. a. Dub. Cro. El. 345. R. acc. Mo. 688.] Poph. 48. 50. R. per tot. cur. Dy. 296. b. R. sape Rol. 788. l. 20. R. sape 1 Vent. 140. R. 1 Sid. 26. 82. Vide ante, (A 1.)*

So, it ought to be a covenant with another and his heirs; for otherwise it is but a personal covenant, which does not raise an use. *D. 1 Sid. 26.*

And, with a person capable; for with his wife is not good. *2 Rol. 788. l. 40. Co. L. 112.*

So, the covenantor ought to be seised at the time of the covenant; otherwise he cannot stand seised to the use of another; and therefore, a covenant to stand seised of lands, which he shall afterwards purchase, is void. *R. Mo. 342. R. 2 Rol. 790. l. 30. 40. R. Cro. El. 401. Win. 60. F. g. 237.*

Or, of such land in particular, which he shall then after purchase. *2 Rol. 790. l. 37.*

So, if a joint-tenant covenants to stand seised of the moiety of his companion after his death; it is void, tho' he survives. *R. 2 Rol. 790. l. 45. Mo. 776.*

Or, if one covenants to stand seised of so much land as is worth 20 *l. per ann.* *R. Het. 147.*

[But

[But a man seised may covenant to stand seised to the use of another after covenantor's death. *Roe v. Tranmer*, T. 30 & 31 G. 2. 2 *Wils.* 75.]

So, the covenant ought to be, that he himself will stand seised, &c. tho' the uses do not arise until after his death; for a covenant that his heir shall stand seised, is not good. *Per Hob.* 313.

Or, that he will levy a fine to his son, who shall stand seised, &c. *R.* 3 *Lev.* 306.

(G 2.) By what Words.

So, there ought to be apt words and a manifest intent: and therefore, if the words are future and obligatory, and not *in presenti* and declaratory, no use arises. *D. Ray.* 48. *Win.* 36. 60. *Adm. Pol.* 535.

So, if the words seem intended for another purpose: as, if a man covenants, that another shall enjoy free from incumbrances; it does not amount to a covenant to stand seised. *R.* 1 *Sid.* 26. *Adm. Ray.* 48.

So, articles of agreement by which a man covenants, grants, bargains, and sells, &c. do not amount to a covenant to stand seised; for they are only preparatory to a subsequent conveyance. *R. Ray.* 43. 1 *Sid.* 82.

So, a covenant to levy a fine, which and all fines shall be, and the covenantor shall stand seised, to the use of B., does not amount to a covenant to stand seised. *R.* 3 *Lev.* 126. *Adm. Win.* 36.

So, articles, by which a mother grants and demises to her son. 2 *Lev.* 214. *R. Lev.* 56.

So, a covenant to levy a fine to a son, and that the land shall remain to the son free from incumbrances. *R.* 3 *Lev.* 306.

To make an estate to A. and B., and that all estates shall be to the use of the same indenture. *R. Dal.* 112.

So, if the intent of the covenantor appears uncertain: as, if a man, in consideration of marriage, covenants that land shall descend, remain, and come, &c. for it does not appear, whether he intends that he shall have it by descent, or by way of remainder. 2 *Rol.* 788. l. 50. *Vide* 2 *Lev.* 77. *R. Bend. pl.* 153. 1 *And.* 25.

So, if he covenants, or gives, and grants land after his decease; for it does not appear that he intended to make himself tenant for life. *R.* 2 *Rol.* 788. l. 45. 789. l. 5. *R.* 1 *Sid.* 3. *Semb. cont.* 2 *Lev.* 77. 226.

So, if for affection he gives or grants lands, of which he was seised in reversion after an estate for life to B. and his heirs, to the use of D. and his heirs; for the use is not limited to B., but was intended to arise out of his estate, which cannot be. *R.* 1 *Sid.* 26. *R.* 2 *Vent.* 319.

If *cestuy que use* in tail, 14 H. 8., covenants, that he or his feoffees will not make an estate, levy a fine, &c. but that the lands, after his death, shall descend to his son; this does not raise an use, but is a covenant only. 3 *Leo.* 6. *Bend. pl.* 153.

So, if another sort of conveyance seems intended, it shall not be construed to be a covenant to stand seised: as, if a man gives, or bargains and sells land to his son, without more; no use arises by way of covenant. *Cro. El.* 394. *Semb.* 2 *Cro.* 127.

If he covenants, that after his death the land shall remain and be to his son, and his wife. *R. Win.* 60. *R. Cro. El.* 279.

So,

So, if a man makes a charter of feoffment, with a letter of attorney to make livery, and livery is not made; it does not operate by way of covenant. 8 Co. 94. R. cont. 2 Lev. 213.; but there was a blank for the name of the attorney.

So, if by deed inrolled in consideration of marriage, he grants, gives, and confirms, and inserts a letter of attorney to make livery. Agr. 2 Rol. 787. l. 12. Cont. 2 Lev. 213. Adm. Pol. 532.

[Yet if the covenantor is seised in fee, and there are apt words (as grant) a plain intent, and a proper consideration, (as naming one, the eldest son of his well-beloved uncle,) a release (void as such, because a grant of freehold to commence *in futuro*) shall take effect as a covenant to stand seised. *Roe v. Tranmer*, T. 30 & 31 G. 2. 2 Wils. 75.]

Yet the word, *covenant*, is not necessary, if there be words equipollent. 1 Vent. 140. 2 Rol. 789. l. 30.

And therefore, if a man, in consideration of marriage, gives, grants, and confirms land to A. and his heirs, to the use of him and his heirs; it shall be good by way of covenant. R. 2 Rol. 787. l. 5. R. 3 Mod. 237.

[If A. seised in fee, in consideration of marriage to be had between him and B., by indenture between A. one part, and B. and C. other part, gives, grants, enfeoffs, aliens, and confirms to B. and C. and their assigns, the lands then in his possession, *habend.* to the use of B. for life, remainder to the heirs of her body by A., who covenants the lands shall remain to the said uses, clear of charges; this shall operate as covenant to stand seised, and B. has an estate in special tail, A. an estate for life by implication, and the reversion in fee. *Doe v. Assigns of Simpson*, T. 28 & 29 G. 2. 2 Wils. 22.]

So, if a father, for natural affection, gives land to his son; tho' livery be indorsed and not executed. Ray. 46.

[If a father by deed, in consideration of natural love, grants lands after his decease to his two children, it is a covenant to stand seised. *Rigden v. Vallier*, H. 1750, 2 Vesey, 252.]

So, if for affection he grants and assigns a rent in fee; tho' this be a conveyance at common law. Ray. 48. 2 Vent. 150. R. 3 Lev. 372.

So, if he grants, bargains, sells, enfeoffs, and confirms land; tho' there be a clause of warranty in the deed, and a covenant for enjoyment when the estate shall be executed. R. 1 Vent. 137. 1 Mod. 175. 2 Lev. 10.

So, in all cases, where the intent appears, that the covenantee shall have the estate, if the deed be defective, it shall be construed a covenant to stand seised: as, if a son covenants, that if he dies without issue, he gives and grants the land to his mother. R. 2 Lev. 226. 3 Lev. 372. 2 Jon. 105. Pol. 527. Carth. 39.

If a man gives and grants a rent to A. and his heirs, *habendum* after his death, if he dies without a son then living. R. 3 Lev. 370.

If he covenants, that after the death of him and his wife the land shall descend and be to his son and his wife. *Semb. Win.* 37.

If he enfeoffs trustees, and grants to them to stand seised to the use of his brother, and there be no livery. 1 Ver. 141. But there was in the deed an express covenant that the *cestuy que trust* should enjoy.

(G 3.) Upon what Consideration.

(G 3.) *What shall be a good one.*] So, there ought to be a sufficient consideration, otherwise no use arises.

And the consideration proper for raising an use by way of covenant, is for love and affection.

In consideration of his brotherly love. *Pl. Com.* 309. *2 Rol.* 785. *l.* 20.

In consideration of marriage had, or intended. *Per Twissd.* *1 Sid.* 83. *Pl. Com.* 301. *b.*

So, for advancement of his blood or kin, &c. *Pl. Com.* 309.

That the lands should continue in his name, or blood. *Pl. Com.* 309. *2 Rol.* 785. *l.* 50.

That they should descend to his heirs male, &c. *Pl. Com.* 309. *b.* *2 Rol.* 785. *l.* 40. *7 Co.* 13. *b.*

So, payment of debts, &c.

In consideration that he was bound for him in several recognizances. *Semb. Cro. El.* 394.

That he will enclose him of such land. *Win.* 59.

And it is sufficient, if a consideration appears by the import of the deed, tho' it be not expressed: as, if a man covenants to stand seised to the use of his son, daughter, wife, brother, &c. *7 Co.* 40. *R.* *1 And.* 79.

To the use of his mother. *R.* *2 Jon.* 105.

So, if a man, for love to his son, covenants to stand seised to the use of himself for life, and afterwards to his wife for life, and afterwards to his son, &c. an use arises to his wife (being named his wife) tho' another consideration is expressed. *R.* *2 Rol.* 782. *l.* 40. *7 Co.* 40.

So, if a consideration expressed for one extends to another, to whom by the covenant the estate is limited in the same deed; it is sufficient: as, if a man, in consideration of affection to his eldest son, covenants to stand seised to the use of him in tail, and afterwards to the use of his younger son, &c. an estate arises to the younger son; for the consideration expressed to the elder extends to the younger son. *R.* *2 Rol.* 783. *l.* 5.

If, in consideration of affection to his brother, he covenants to stand seised to the use of his brother and his wife for their lives; this extends to the wife of his brother. *2 Rol.* 783. *l.* 50. *786. l.* 10.

So, in consideration that he will marry his daughter, a covenant to be seised to the use of both. *2 Rol.* 784. *l.* 5. *15.*

So, in consideration of affection to his son, extends to the wife of his son. *2 Rol.* 784. *l.* 10. *2 Cro.* 168.

So, if an estate be limited to several, upon a consideration which extends only to one, the use of the whole arises to him: as, if a man, in consideration of affection, covenants to stand seised to the use of *B.* his brother, *D.* and *C.* in trust, &c. tho' *D.* and *C.* are strangers, to whom the consideration does not extend, *B.* shall have the whole. *R.* *2 Rol.* 783. *l.* 15. *Vide post.* (G 5.)

So, if some considerations expressed are good, and some not, it is sufficient: as, in consideration of 100 *l.* and a rent to be granted; tho' the consideration of the rent is executory, and therefore not good, the use arises upon the other consideration of 100 *l.* *R. Mo.* 547, 8.

So,

So, a grant in consideration of affection, and also of money, shall be good by way of covenant. *R. 3 Lev. 192.*

So, a consideration consistent with the deed, or with the considerations expressed, may be averred. *2 Co. 76. 2 Rol. 786. l. 45. 790. l. 5. 7 Co. 40.*

As, if in consideration of continuing the estate in his family, &c. a man covenants to stand seised to the use of *B.* it may be averred, that *B.* is of his kin. *F. g. 301.*

So, if the consideration expressed is not sufficient to raise an use, it may be averred to be made upon other considerations, which are good. *2 Rol. 790. l. 10.*

[*Contra* if no consideration is mentioned in a deed, you may enter into proof of consideration; but, if any consideration is mentioned, and not said for *other considerations*, you cannot prove any other. *Peacock v. Monk, 1748, 1 Vesey, 127.*]

[But when the consideration expressed in the deed of conveyance was *28l.*, parol evidence was admitted to prove that *30l.* was the real consideration. *Rex v. Scammonden, M. 30 Geo. 3. 3 T. R. 474.*]

[And other considerations may be proved than those expressed in the deed. *Ibid. Filmer v. Gott, 7 Bro. P. C. 70.*]

(G 4.) *What not.* If it be too general, or does not import a real consideration.] But if the consideration be too general, it is not sufficient: as, if a man, for divers good and valuable considerations, covenants to stand seised; no use arises. *2 Rol. 786. l. 35. R. 1 Co. 176. a. Mo. 145. R. 2 Co. 15.*

So, if the consideration mentioned does not import *quid pro quo*: as, in consideration of long acquaintance, or being school-fellows, &c. *Pl. Com. 302. a. R. 2 Rol. 783. l. 35.*

Or, being chamber-fellows, or, intire friends. *R. 2 Rol. 783. l. 30.*

In consideration, that the king is the head of the commonwealth, hath the charge of preserving peace, repelling hostilities, &c. *R. 2 Co. 15. Semb. 1 And. 141.*

In consideration of love and affection to him who is not his kin.

Or, to his bastard, or natural son. *Co. L. 123. a. R. 2 Rol. 785. l. 25. 30.*

So, if it be, in consideration that *A.* out of the profits of the lands shall pay his debts; it is not sufficient to raise an use to *A.* for he gives nothing. *R. Mo. 194. 1 Leo. 195.*

Yet if a covenant be, in consideration of marriage, to *A.* and *B.* and the heirs of their bodies, &c. and afterwards there be a seoffment and fine to the same uses; tho' the marriage does not take effect, but *B.* (the woman) marries another, she shall take a moiety for life; for by the fine, &c. the uses are fixed in *A.* and *B.* *R. Jon. 346. (Vide 2 Rol. 795. l. 5.)*

(C 5.) *If the covenantee be a stranger to the consideration.*] So, if a man be a stranger to the consideration, no use arises to him; as, if a man, in consideration of marriage between his son and *A.* covenants to stand seised to the use of them for life, remainder to *C.*, the remainder is void. *Pl. Com. 307. b. 2 Rol. 784. l. 20.*

If, for payment of debts, &c. he covenants to stand seised to the use of himself for life, and afterwards to *A.* for years; the estate to

A. is void, if he was not executor. *R. 2 Rol. 784. l. 35. 1 Co. 154. a. 1 Leo. 195. 1 And. 260.*

If, for advancement of his blood and marriage of his bastard, he covenants, &c. no use arises to the bastard; for she is *filia populi*, and a stranger. *2 Rol. 785. l. 25. 1 And. 79. Vide Bastard (E).*

If, for advancement of his blood, name, and issue, he covenants to stand seised to his first, second, and other sons in tail, remainder to the king; the remainder to the king is void, for want of a consideration. *R. Mo. 195. 2 Co. 15.*

If, in consideration of the marriage of his son with *A.*, without saying, for a settlement in his name or blood; no estate shall arise to himself, for the father is a stranger to this consideration, which was personal to the son. *1 Brownl. 193.*

So, if in consideration of natural affection, a man covenants to stand seised to himself for life, with power to make leases, &c. a lease to a stranger is void, for he is not within the consideration, upon which the power was founded. *R. 2 Rol. 260. l. 30. 2 Cro. 181.*

So, if it be in consideration of marriage, with power to make leases, and the husband leases to a stranger; the lease is void as to the wife. *R. 1 Lev. 30.*

So, if one covenantee be a stranger, and the other not, the whole vests in the other: as, if *A.* for natural love, covenants with *B.* his brother, *C.* and *D.* to stand seised to the use of the covenantees and their heirs, in trust to raise portions for his issue; the whole use vests in *B.* his brother, to whom the consideration extends, not to the others. *R. Jon. 419. 2 Rol. 783. l. 15.*

Tho' the limitation was, upon trust to raise portions, the estate vests, which is not destroyed by the trust; but the estate shall be subject to the trust in equity. *R. Jon. 419.*

And if the trust becomes impossible by the act of God, the estate shall be absolute in the trustee. *Ibid.*

So, if in consideration of affection to his wife, a man covenants to be seised to him for life, afterwards to his wife for life, afterwards to such as his wife shall appoint; the consideration does not extend to a stranger to whom the wife shall appoint it. *Semb. F. g. 300.*

[If *A.* in consideration of love and affection to his wife, covenants to stand seised to the use of them, and the survivor for life, remainder to their issue, remainder to such person as wife shall dispose to, and for want of such disposition to *B.*, which *B.* is nephew to *A.*, tho' not named as such in the deed, and the wife after *A.*'s death without issue conveys to *D.* *D.* has no title, as being a stranger, and *B.* has a title, as being named in the deed, he may aver himself within the consideration. *Goodtitle v. Petto, P. 5 G. 2. Str. 934.*]

So, if a man, in consideration of marriage and 100 *l.* paid, covenants to stand seised to *A.*, and *B.* his intended wife; no use arises, tho' the money be paid, if the marriage does not take effect; and the marriage was the principal, and the money only accessory to it. *R. Mo. 102.*

So, if the consideration be contingent or future, no use arises till it happens: as, if a man, in consideration of his marriage with *B.*, covenants to stand seised to the use of himself and *B.*, no use arises till the marriage takes effect. *R. 2 Rol. 792. l. 50. Vide Uses, (K 7.)*

If

If a man, in consideration that *A.* will pay his debts, &c. covenants to stand seised to the use of *A.* &c. no use arises till the consideration be executed. *R. Mo.* 194.

But a contingent use shall arise by a covenant to stand seised, as well as by a feoffment. *Per three J. Cro. El.* 801.

So, if the consideration ceases, the use also ceases: as, if a man, in consideration of his marriage with *B.*, covenants to stand seised to the use of him and *B.*, and the marriage is solemnized before *B.* attains the age of twelve years, who after such age disagrees; the use ceases as to *B.* *2 Rol.* 792. *l.* 52.

So, if after marriage they be divorced. *2 Rol.* 792. *l.* 52.

Pleading concerning Covenants, and in Writ of Covenant.

Vide Pleader, (C 45, &c.—E 25, 26.—2 V 1, &c.—2 W 32.)

Release of Covenants.

Vide Release, (E 4.)

Vide also more of title Covenant, in *Chancery*, (2 M 16.—2 X 1, &c.)

COVERTURE.

Vide Abatement,—(E 6.—F 2.—H 42.)—*Pleader*, (2 W 21.)

COVIN.

(A) Covin, What shall be.

COVIN is a secret contrivance between several to defraud and prejudice another. *Co. L.* 357. *a.* 9 *Co.* 110.

So, fraud may be committed by one only. 9 *Co.* 110. *b.*

(B 1.) An Act by Covin is void.

THE law abhors covin; and, therefore every covinous act shall be void.

So, a lawful and rightful act, if it be done by covin, shall be void: as, if a wife, after the death of her husband, be of covin with *B.* to disseise the tenant, and endow her; the tenant shall avoid the dower. *Co. L.* 357. *b.*

If tenant for life makes a surrender of his estate, to defraud his creditors, it shall be void. *Vide Hale in 1 Vent.* 257.

(B 2.) So, a fraudulent Gift, &c.

By the *stat.* 50 *Ed.* 3. 6. because divers give their chattels by collusion, and then flee to places privileged till their creditors compound, it was enacted, that if such gift be found to be made by collusion, the

the creditor shall have execution of the chattels, as if no gift had been made.

And by the *st.* 3 *H.* 7. 4. deeds of gift of goods and chattels to defraud creditors, made on trust, &c. shall be void.

So, by the *st.* 13 *El.* 5. every gift, grant, bargain, &c. of goods and chattels, or any profit out of them, and every bond, judgment, and execution made of intent to defraud creditors or others of their just actions, debts, damages, forfeitures, heriots, mortuaries, &c. shall be void against the person so defrauded, his heirs, executors, or administrators, &c.

And, if any party or privy to such fraudulent gift, grant, &c. put in ure, or avow, &c. the same as true, and done *bonâ fide* and on good consideration, he shall forfeit the whole value of such goods, bond, &c. a moiety to the queen, a moiety to the party aggrieved.

Provided, not to avoid any interest in goods, chattels, &c. conveyed, &c. on good consideration and *bonâ fide* to any person, not having at the time of such conveyance notice of such covin.

[If *A.*, indebted to *B.* and *C.*, after being sued to judgment and execution by *B.* go to *C.*, and voluntarily give him a warrant of attorney to confess judgment, on which judgment is immediately entered and execution levied on the same day on which *B.* would have been entitled to execution and had threatened to sue it out; the preference so given by *A.* to *C.* is not unlawful, nor fraudulent within the meaning of this statute. *Holbird v. Anderson*, *B.R. E.* 33 *Geo.* 3. 5 *T.R.* 235.]

A fraudulent gift, or grant of goods and chattels, was void by the common law. *Dy.* 295. *a.*

And, therefore, if it was made after judgment to defraud the execution, it was not a trespass in the officer, or creditor, who took them in execution. *Dy.* 295. *a.*

Yet, a fraudulent deed was not void by the common law against him, who had a younger title. *R.* 3 *Co.* 83. *a.*

But now, without question, every gift, grant, &c. being fraudulent shall be void, as to creditors, &c. whether they claim by a younger, or by an elder title.

As, if a man, being in debt, conveys his goods to another, and takes the profits. *Dy.* 295.

If a man before his death bargains and sells all his horses to another, without a consideration, to defraud the lord of his heriot. *Dy.* 351. *b.*

If a man, indicted for recusancy, conveys his leases and goods to others, upon feigned considerations, to defeat the king of his forfeiture, and then flies over sea. *R.* 3 *Co.* 82. *a.*

And the word, *forfeiture*, in *st.* 13 *El.* 5. shall be extended to every thing which may be forfeited to the king, or to a subject. *R.* 3 *Co.* 82. *b.*

If *A.* makes a feoffment to avoid a *formedon*, &c. against him, and then pleads non-tenure. *R.* *Cro. El.* 233.

And a deed has the ensigns and marks of fraud, if it be comprised in general terms: as, if he grants all his goods and chattels generally without exception. *R.* 3 *Co.* 81. *a.*

If it be made in a secret and clandestine manner. *R.* 3 *Co.* 81. *a.* 6 *Co.* 72. *a.*

If

If it be pending an action, indictment, &c. 3 Co. 81. a.

If it be accompanied with unusual clauses: as if the deed expresses, that it was made honestly and *bonâ fide*, &c. *Ibid.*

Or, has the colour of payment of debts; when none were paid, and the possession continues with the bargainor. 6 Co. 72. a.

So, if it be upon an express trust. 3 Co. 81. b.

Or, if a trust be implied: as, if after the gift, bargain, &c. the vendor continues in possession, and takes the profits, &c. 3 Co. 81. a.

If the grant be without any consideration. 3 Co. 81. b.

If the grant be for affection, or in consideration of blood, or nature. *Ibid.*

Or, to a son, cousin, or other relation. *Ibid.*

If a bargain, &c. of goods be attended with marks of fraud, it shall be void, tho' it was made upon good and valuable consideration: as, if A. conveys all his goods and chattels to a real creditor for satisfaction of his debt, and afterwards continues in possession, &c. R. 3 Co. 80. b. [2 Term Rep. 587.]

[So, the purchase of a debtor's goods, with the knowledge of a sequestration by Chancery, or of a judgment and execution, though for a valuable consideration, is void: Cowp. 434.]

[If the vendee continue in possession, and appear as the visible owner, this is evidence of fraud. *Id. ibid.*]

[So, is the circumstance of a man's being indebted at the time of his making a voluntary conveyance. *Id. ibid.*]

[But these are not conclusive; the question may still remain, Whether the conveyance was *bonâ fide*? Therefore, where A. being indebted, in consideration of marriage, and of 10,000 l. his wife's portion, which was supposed to be more than the amount of his debts at that time, along with his real estate, which was thought not to be an adequate settlement, conveyed likewise his household goods, in trust for himself for life, remainder to his wife for life, remainder to his first, &c. son in strict settlement. The lady being a ward of Chancery, the settlement was approved of by the master, and the goods enumerated in a schedule. A. after marriage continued in possession of the goods; it was held that this conveyance was good even as against creditors at the time of the settlement. Cowp. 432.]

So, if A. indebted to several persons, conveys all his goods to one in satisfaction of his debt, upon agreement, that he will deal favourably with him; for tho' it be a good consideration, it is not *bonâ fide*. R. 3 Co. 81. a.

If a man be party or privy to a fraudulent grant, &c. an information lies against him upon the *st.* 13 El. 5. 3 Co. 80. b.

Or, an action of debt for so much as is the value of the goods, by *qui tam*, &c. Dy. 351. b.

And, if to defraud of an heriot, &c. a fraudulent deed be made of twenty horses; an action lies for so much as was the value of all the horses contained in the grant. *Per two J. Manw. cont.* Dy. 351. b.

If a fraudulent gift, grant, &c. be made, it shall be absolutely void as to creditors.

But, it is not void as to the party, his executor, or administrator: and therefore, the administrator, to covenant for delivery of goods sold by fraud to B. and covenanted to be delivered at the death of the

covenantor, cannot plead the *st.* 13 *El.* 5. and that the sale was to defraud creditors. *R. Yel.* 196, 7. 2 *Cro.* 271.

But a gift, bargain, &c. shall not be fraudulent, if it be made *bonâ fide* and upon valuable consideration. *Vide post.* (B 4.)

(B 3.) And a fraudulent Feoffment, &c.

So, by the *st.* 50 *Ed.* 3. *quod vide ante*, (B 2.) a feoffment found to be by collusion to avoid execution, shall be void.

And by the *st.* 13 *El.* 5. every feoffment, grant, conveyance, &c. of lands or tenements, or any profit or charge out of them, as of rent, common, &c. made to defraud creditors, or others, of their just actions, suits, debts, damages, penalties, forfeitures, heriots, mortuaries, reliefs, shall be void as to all persons who might so be defrauded, their heirs, successors, executors, administrators, or assigns.

So, by the *st.* 27 *El.* 4. every conveyance, grant, charge, estate, incumbrance, or limitation of use, of, or out of lands or tenements, made to defraud any who hath or shall purchase in fee, for lives, or years, the same lands, or any part of them, or any rent, &c. out of them, shall as to such purchaser for money or other good consideration, and all claiming by, from, or under him, be void.

And every conveyance, &c. with any clause of revocation, &c. shall be void as to any, who shall after purchase for money or other good consideration, (the first conveyance not revoked,) and all claiming by, from, or under them.

And any, party or privy to such fraudulent conveyance, who puts the same in ure, as true and made *bonâ fide* or on good consideration, to the prejudice of such purchaser, shall forfeit one year's value of such lands; a moiety to the queen, a moiety to the party grieved.

Provided not to extend to any conveyance, charge, &c. made on good consideration, and *bonâ fide*.

And therefore, every feoffment, &c. made to defraud creditors, &c. shall be void. *Vide Fraudulent Gift, &c. ante*, (B 2.)

So, every conveyance, &c. to defraud a purchaser, is void as to him, &c.—*Who shall be a purchaser, vide in Chancery*, (4 I 2.)

So, if tenant for life commits a forfeiture, to the intent that the reversioner shall enter; a purchaser shall avoid it, as well as a conveyance. *Per Hale*, 1 *Vent.* 257.

Every voluntary conveyance *primâ facie* shall be fraudulent as to a purchaser. *Adm.* 1 *Sid.* 133. 1 *Vent.* 194. *R. Ca. Ch.* 100. 217. *Per Hale*, 2 *Lew.* 147.

Tho' it be for advancement of his blood, for natural affection, &c.

Tho' it be in consideration of a marriage had, where there was no precedent agreement for it. *Ca. Ch.* 99. *Vide infra. Vide post.* (B 4.)

So, a secret lease, &c. shall be fraudulent. 6 *Co.* 72.

So, a conveyance upon colour of a good consideration, is fraudulent, where it is only colourable: as, if a man assigns a lease to an infant for payment of debts, which are not paid. *R.* 6 *Co.* 72.

If he conveys to his daughter, &c. for her provision in marriage, and she does not marry. *R.* 1 *Sid.* 133.

Or, conveys to trustees to the use of himself for life, with power to make a mortgage, and then in trust to sell for payment of his debts. *R.* 2 *Ver.* 510. If

If tenant in tail conveys to trustees by fine upon trust to pay debts, with power to make leases with rent or without rent, for any time, and afterwards continues in possession; for the power of leasing, and the continuance in possession, are marks of fraud. *R. 2 Lev.*

147.

So, if there was an agreement before marriage to make a settlement, and he after marriage makes a settlement for other purposes. *R. 2 Lev.* 147.

If the agreement was only for a jointure to the wife, and the settlement goes to the issue of the marriage, it will be fraudulent for so much. *1 Ver.* 285, 6.

If the agreement was upon the marriage of *B.* his son, and after a limitation to *B.* for life, he limits in remainder to another son; the remainder will be fraudulent as to a purchaser. *R. Lane,* 22.

[But if *A.* seized in fee has a mother who has annuity issuing out of the whole lands, and two brothers *B.* and *C.*, and the mother previous to *A.*'s marriage consents to part with her security on the whole lands, and to take it on part of the lands, and *A.* and mother join in fine, and then in consideration of said grant and release, and of marriage and portion, conveys to trustees to pay annuity out of part, then the whole lands to the use of *A.* for life, remainder to preserve, &c. remainder to first and other sons, remainder to *B.* and *C.* successively in tail-male, remainder to the daughters of *A.*, remainder to *A.* in fee; the mother's consent to change her security is a good consideration for *A.* to make this settlement on *B.* and *C.* *Roe v. Mitton, M.* 8 G. 3. 2 *Willf.* 356.]

So, a conveyance with a clause of revocation will be fraudulent as to a purchaser, though the power of revocation be future, viz. after the death of *B.* &c. and the statute speaks only of a present power. *R. 3 Co.* 82. *b.* *Mo.* 618. *Bridg.* 23.

So, if the power of revocation is to be exercised with the assent of another. *3 Co.* 82. *b.* *Bridg.* 23.

Or, to be executed by another.

So, if the power be reserved by the recoveror, and not by him to whose use the recovery was. *R. Mo.* 616.

So, a conveyance, with a power of revocation, will be fraudulent tho' made in consideration of marriage, &c. *Lane,* 22.

So, it will be void as to the trustee of a statute, or any who has a charge out of or upon the land, as well as to a purchaser, or grantee, &c. of the land itself. *R. Bridg.* 22.

So, if a conveyance be with a clause of revocation, and afterwards the power be extinguished by fine, feoffment, &c. to the intent to defraud a purchaser; the fine, feoffment, &c. shall be void as to him, for a conveyance with a power of revocation is in the same degree as a conveyance by fraud. *R. 3 Co.* 83. *a.* *Mo.* 618.

If a father makes a fraudulent lease, &c. and the son sells the estate, the purchaser shall avoid it. *R. 6 Co.* 72. *b.*

Though the son did not know of the fraudulent conveyance. *6 Co.* 72. *b.*

A fraudulent conveyance shall be void as to a purchaser though he had notice of it before his purchase. *R. 5 Co.* 60. *b.* *D. 2 Lev.* 105.

(B 4.) What shall not be fraudulent.

But a conveyance shall not be fraudulent, if it be made upon good consideration, tho' it was concealed, or secretly made. *R. 2 Cro. 158. 455. R. 1 Vent. 194.*

So, if it was concealed in the time of the civil war, for fear of a sequestration. *R. 1 Sid. 134.*

So, a lease made by him who has a power of revocation shall not be fraudulent, though there be no consideration, except the rent reserved. *R. 2 Cro. 181.*

So, a conveyance upon a good consideration is not fraudulent, though it was not for money: as, if it be upon consideration of a marriage to be had. [*Vide Cow. 705. 708.*]

So, if it be made after marriage, in pursuance of articles, &c. before marriage. *R. 2 Cro. 158. 455. R. 1 Vent. 194. Vide ante, (B 3.)*

Or, in pursuance of an agreement by *parol* before marriage. *2 Cro. 158. 455. 1 Vent. 194.*

Tho' it be provided, that it shall be void upon settlement of another jointure on his wife, and so in some sort is determinable at his pleasure. *R. 2 Cro. 455.*

Or, if it be with a clause of revocation, with the consent of four trustees for the wife; for the settlement, being upon good consideration, and not determinable at his pleasure, or of any in trust for him, is good. *R. 2 Jon. 94.*

So, if husband and wife join in the alienation of land, limited to them and the heirs of their bodies by marriage settlement, and the same day the husband settles lands of greater value to the same uses; the second settlement is not fraudulent as to a purchaser of the same land, though it does not appear to be pursuant to the marriage agreement; for it shall be intended the wife would not otherwise have joined in the alienation of her jointure. *R. 2 Lev. 71.*

So, if the husband, upon such alienation, undertakes to give to the wife, at his death, 400*l.* and afterwards gives an obligation to such intent. *R. 2 Lev. 148.*

So, a settlement upon marriage, with a proviso to charge land with 2000*l.*, is not void as to a purchaser; tho' it was voluntary as to such proviso. *R. 1 Lev. 151.*

So, if a conveyance, in its commencement voluntary or convinous, becomes afterwards settled upon a good consideration, it shall not be avoided, as fraudulent, by a subsequent purchaser: as, if a man conveys to his daughter, as a provision for her when she shall marry, and upon prospect of this settlement, she marries, and then the father sells for a valuable consideration; the purchaser shall not avoid the settlement upon the daughter. *R. 1 Sid. 133, 4.*

So, if a man makes a covinous settlement upon his son, who sells for a valuable consideration, and afterwards the father sells to another for money; his purchaser shall not avoid the settlement by the son. *R. 1 Sid. 134.*

So, if a voluntary lease be assigned for a valuable consideration, the purchaser of the inheritance after the assignment, shall not avoid it. *R. 3 Lev. 388. Skin. 423.*

So, a voluntary settlement by a father, shall not be avoided by a purchaser from the son. *1 Ver. 46.*

So,

So, if the consideration extends only to an estate-tail; a remainder afterwards, though without good consideration, is not fraudulent; for a remainder after an estate which may be perpetual, shall not be supposed made for defrauding creditors. *R. 2 Lev. 105.*

So, a settlement after marriage, in consideration of the wife's joining in the alienation of her jointure, shall not be fraudulent as to the issue, tho' the husband might have barred them without his wife. *R. 2 Lev. 71.*

So, a voluntary conveyance shall not be taken to be fraudulent, as to a purchaser upon a consideration of nature, or blood, &c. for the words in the *st. 27 El. for money or other good consideration*, are tantamount to the words, *or other valuable consideration.* *R. 3 Co. 83.*

And, therefore, if a man for advancement of his heirs male to be begotten, upon the body of his wife, covenants to levy a fine to the use of himself for life, and afterwards to his eldest issue male upon the body, &c. and afterwards, to defeat that covenant, makes a fraudulent lease, and then levies the fine; tho' the eldest issue be a purchaser *bonâ fide*, he shall not avoid the lease. *R. 3 Co. 83. b. Cro. El. 444.*

Or, covenants to stand seised to the use of his son, nephew, &c. *R. Mo. 602.*

So, if a man makes a settlement after marriage, upon his wife for her jointure, without a precedent agreement, the wife shall not avoid a fraudulent conveyance made before. *R. Cro. El. 445.*

So, if a lease be made *bonâ fide*, but without a fine given, or rent reserved; the lessee shall not avoid a fraudulent conveyance made before. *R. 3 Co. 83. a.*

So, if a man, by imposition of the vendee, sells to him at an under-value; he shall not avoid a voluntary settlement made by the vendor before by advice of friends: for the statute does not extend to a purchaser by indirect means. *3 Co. 83. b. Cro. El. 445.*

So, if a purchaser upon consideration of nature, or blood, afterwards sells upon a valuable consideration; the vendee shall not avoid a voluntary settlement made prior to the settlement on his vendor. *R. Mo. 602. R. Ray. 25.*

[If a person, having several creditors, convey by deed his legal interest in part of his real and personal property to a trustee, in trust, (after deducting the expences respecting the trust,) out of the rents and profits to pay half of the surplus to the grantor for his own use, and the residue among certain creditors named in a schedule, without any intention of fraudulently delaying the other creditors in obtaining their demands, the deed is good in law. *Estwick v. Cailland, B. R. M. 34 Geo. 3. 5 T. R. 420.*]

[If all the creditors of an insolvent consent to accept a composition for their respective demands upon an assignment of his effects by a deed of trust, to which they are all parties, and one of them, before he executes, obtain from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note be made, the note is void in law, as a fraud on the rest of the creditors. *Cockshott v. Bennett, B. R. M. 29 Geo. 3. 2 T. R. 763.*]

[If *A.* agree to give *B.* a certain sum for goods in advancement to *C.* any secret agreement between *B.* and *C.* that the latter shall pay a farther sum is void, as a fraud on *A.*, and *B.* cannot recover such farther

farther sum from C. *Jackson v. Duchaire*, B. R. H. 30 Geo. 3. 3 T. R. 551.]

[An insolvent assigned over his effects for the benefit of his creditors, and in the deed there was a proviso that the shares of those creditors who did not execute it before a given day, should be paid to the insolvent; an agreement made between the insolvent and a creditor after that day, that the latter should sign the deed, and the former pay the remainder of the whole debt, is fraudulent and void. *Jackson v. Lomas*, B. R. H. 31 Geo. 3. 4 T. R. 166.]

[By a deed of composition between a trader and his creditors, it was agreed that the trader should give them his bills, accepted by a friend, for 10*s.* in the pound, payable in certain proportions at fixed periods, and his own promissory notes for the remaining 5*s.*, and that the creditors should be at liberty to take his own notes only for their full demands if they pleased. One of the creditors who signed the deed took the bills from the debtor, accepted by his friend, for the whole 15*s.* in the pound, payable at the same respective times, as the bills agreed to be given by the deed of composition, and the transaction was adjudged fair, the creditor not receiving by it more than the others. *Feife v. Randall*, B. R. H. 35 Geo. 3. 6 T. R. 146.]

[If, in consequence of a debtor representing to one of his creditors that if he will agree to accept a composition for his debt, all the other creditors will do the same, such creditor do agree, &c. the agreement is not binding on him, if that representation be untrue. *Cooling v. Noyes*, B. R. E. 35 Geo. 3. 6 T. R. 263.]

Vide Fraud, in title *Chancery*, (3 F 1, 2.—3 M 1, &c.—3 N 1.—4 D 3.—4 H 4.—4 L 1.—4 O 2.)

C O U N C I L.

King's Council.

Vide Roy, (E 1, &c.)

President of the Council.

Vide Roy, (E 2.)

Privy Council.

Vide Roy, (E 2, &c.)—*Parliament*, (L 30.)

Common Council.

Vide Franchises, (F 25.)—*London* (F).

C O U N T.

Vide Abatement, (G 1, &c.)—*Accompt*, (E 2.)—*Action upon the Case*, (C 2.)—*Action upon the Case upon Assumpsit*, (H 2, &c.)—*Action upon the Case for a Conspiracy*, (C 2, &c.)—*Action upon the Case for a Deceit*, (F 2, 3.)—*Action upon the Case for Defamation*, (G 1, &c.)—*Action upon the Case for a Disturbance*, (B 1.)—*Action upon the*

the Case for Negligence, (B 1.—C 2.)—Action upon the Case for a Nufance, (E 1.)—Action upon the Case upon Trover, (G 1, &c.)—Amendment, (L 1, 2.)—Annuity (E).—Appeal, (G 6.)—Attorney, (B 21.)—Audita Querela, (E 6.)—Charters, (B 2.)—Courts, (P 9.)—Droit, (C 4.)—Pleader (C 1, &c.)—(F 6, 7. 12.—M 1.—S 24. 43.—Y 3.—2 L 1.—2 S 16.—2 V 2.—2 W 7, &c.)—(2 X 2.—2 Y 2.—2 Z 1.—3 A 5.—3 E 2.—3 F 2.—3 I 3.—3 K 10.—3 M 3.—3 N 3.—3 O 2.—and other places in the same title).—Prohibition (1).—Quare Impedit, (B 2.)—Voucher (E).

COUNTERFEITING.

Vide Forgery.

Counterfeiting the Great or Privy Seal.

Vide Justices, (K 6.)

Counterfeiting Money.

Vide Justices, (K 7.)

COUNTERMAND.

Countermand of a Will.

Vide Devise, (F 1, 2.)

Countermand of an Authority.

Vide Attorney, (B 9, &c.—C 8, &c.)

COUNTERPLEA.

Vide Voucher, (B 1, 2.)

C O U N T Y.

(A) County.

THE kingdom was divided into counties before the time of king *Alfred. Co. E. 168. a. 2 Inst. 71.*

But others aver, that the division of the kingdom into counties, and of the county into hundreds, and of the hundred into tithings, was originally made by king *Alfred.*

The county, by the *Saxons*, was called the shire, from *Schiram, partiri. Co. L. 168. a.*

The king by his patent may make a county, or erect any part of a county into a county by itself. *Poph. 17.*

So, in the erection of a town into a county he may reserve a privilege, &c. which the county out of which it is taken, had there before :

before: as, to hold courts, assizes, gaol-delivery there. *R. Poph.* 17.
1 *And.* 292.

The courts of *Westminster* judicially take notice of every county.
2 *Sal.* 266.

As to county palatine, *vide Franchises*, (D 1, &c.)—*Abatement*,
(D 2.)

As to *Wales*, *vide Wales*, (A 3.)

(B) Sheriff.

(B 1.) How constituted.

THE earl had antiently the government of the county. *Co. L.*
168. a. *Dav.* 60. a.

And now the sheriff is the principal officer there under the king.
Co. L. 168. a.

Who was an officer before the Conquest. 3 *Co. Pref.* 2 b.

Antiently the sheriff was chosen, as the coroner is, by the county.

2 *Inst.* 174. 558. By *Art. sup. Chart.* 28 *Ed.* 1. 8.

By the *st. of Linc.* 9 *Ed.* 2. sheriffs shall be assigned by the chancellor, treasurer, barons of the Exchequer, and justices; or, in the absence of the chancellor, by the treasurer, barons, and justices.

By the *st.* 14 *Ed.* 3. 7. by the chancellor, treasurer, chief baron, and two chief justices yearly, the morrow after *All Souls* at the *Exchequer*. (*Vide st.* 12 *R.* 2. 2.)

And the king ought regularly to name one of the three persons presented to him according to the statute. *Certified by the two chief justices, with the agreement of the other justices*, 34 *H.* 6. 2 *Inst.* 559.

But it is not of necessity, that the king appoint one of the three presented to him. *Semb.* 2 *Inst.* 559.

So, the day for nominating sheriffs may be adjourned by the king to a time after the morrow of *All Souls*. *Cro. Car.* 13. *R. Cro. Car.* 595.

So, the king may appoint without such assembly. *R. Dy.* 215. b.

The king by letters patent constitutes him, whom he will have, to be sheriff. *Crompt. Off. of Sheriff*, 183.

And other letters patent are directed to all archbishops, bishops, dukes, earls, barons, knights, and others within the county, to be aiding and attending upon the sheriff. *Ibid.*

But by the *st.* 3 *Geo.* 1. 15. if a sheriff die before his year ends, or be superseded; his under-sheriff shall continue in his office, and execute the same in all things in the name of the sheriff deceased, and shall be answerable for the same in all respects, &c.

(B 2.) For what Time.

Antiently, a sheriff might be constituted for life, for years, or in fee.

But by the *st.* 14 *Ed.* 3. 7. 28 *Ed.* 3. 7. 42 *Ed.* 3. 9. no sheriff shall continue in his office above one year.

And by the *st.* 23 *H.* 6. 8. (which confirms the former statutes,) if any sheriff, under-sheriff, &c. occupy his office contrary to the effect of the said statutes, (except under-sheriffs and all other officers in *London*, and sheriffs in counties that have an estate of inheritance

or

or freehold in their office,) he shall forfeit 200 *l.* yearly, as long as he so occupies: and a pardon of such offence or forfeiture shall be void.

And all patents of the said office for years, for life, in fee, or tail, shall be void.

And therefore, the commission to the sheriff says, *commisimus A. com. nostr., &c. custodiend. quamdiu nobis placuerit. Crompt. Off. of Sheriff.*

Yet by the *st.* 12 *Ed.* 4. 1. & 17 *Ed.* 4. 6. a sheriff may execute and return writs, and do any thing belonging to his office, during Michaelmas and Hilary terms, unless he be duly discharged, without incurring the penalty of the said *st.* 23 *H.* 6. 8.

(B 3.) How discharged.

After a new sheriff is appointed, a writ shall be directed to the old sheriff, commanding him *quod comitat. una cum rotulis, brevibus, memorandis, & omnibus aliis ad officium vic. com. prad. spectan. per indentur. int. te & prafat. W. conficiend. liberet. Crompt. Off. of Sheriff, 183. b. Dy. 355. a.*

And after such writ delivered to the old sheriff, his authority ceases.

So, if it be delivered to the under-sheriff in the county-court. *Per two J. Dy. 355. a. Dub. Crompt. Off. of Sheriff, 183. b.*

And if the under-sheriff, after the delivery of the discharge to his sheriff, does execution, though he did not know it, it shall be void. *Per two J. Dy. 355. a. in marg.*

After the writ to the sheriff for his discharge, he ought to deliver to the new sheriff, by indenture with a schedule, all writs and rolls in his custody, and all prisoners by their names, and the causes for which they were committed to him. *Crompt. Off. of Sher. 183. b.*

[Assignment of prisoners by under-sheriff to the succeeding high-sheriff is good without indenture. *Barnes, 367.*]

And if he does not mention any execution in the schedule, or give notice of it to the new sheriff by *parol*, when he delivers a prisoner to him for another cause, and the prisoner afterwards escapes; an action lies for the escape against the old sheriff. *R. Mo. 688, 9. 2 Leo. 54.*

So, a writ of *superfedeas*, though it be not returnable. *R. 1 Mod. 222. 2 Mod. 217.*

And an action upon the case lies against him, if he does not deliver it. *R. 1 Mod. 222.*

But an execution by the sheriff before notice of his discharge, tho' a new sheriff be appointed, shall be lawful. *R. Dy. 355. a. in marg. R. Cro. El. 440. R. Mo. 364. 186.*

So, the holding of a county court. *Cro. El. 12.*

So, if a barony, or other dignity, descends to the sheriff, he is not discharged; but he continues sheriff during the will of the king. *R. Cro. El. 12.*

Tho' the dignity descends in the time of parliament, so that he ought to attend parliament as a peer. *Cro. El. 12.*

As to the oath, duty, and office of a sheriff, *vide Viscount.*

(C) County Court.

(C 1.) The Style, &c. The Sheriff's Court.

THE sheriff has two courts within his county: the tourn, formerly the *folk mote*, for criminal causes, (*de quo vide* et (A);) and the *scire mote*, or county court. 2 *Inst.* 69. *Dav.* 60. a.

The style of the county court is, *Effex ff. curia prima comit. A. B. vic. com. prad. tent. apud D. &c.* 4 *Inst.* 266.

And therefore, the county court is the court of the sheriff. *R.* 4 *Co.* 33.

A writ of *justicies*, &c. is directed to the sheriff; for it is his court. 6 *Co.* 11. b.

And therefore, the sheriff alone may name the county clerk; for it is incident to his office. *R.* 4 *Co.* 33.

And if the king by patent constitutes a county-clerk before the sheriff himself has his patent; yet the grant of the king shall be void. *R.* 4 *Co.* 33. *Mitton.*

(C 2.) Who shall be Judge there.

The county court is a court-baron and not a court of record, in which the suitors are judges, and not the sheriff. *R.* 6 *Co.* 11. b. *Per Coke and Litt. Catesby cont.* 6 *Ed.* 4. 3. b.

Tho' the plea be there by *justicies*, &c. 6 *Co.* 11. b.

Or, in admeasurement of dower, *replevin*, &c. *Per Litt.* 7 *Ed.* 4. 23. a.

In these cases, the sheriff or his bailiffs are only ministers. 6 *Ed.* 4. 3. b.

And therefore, upon a judgment in the county court, a writ of false judgment lies, and not error. 6 *Co.* 11. b.

Though the judgment be given there upon a *justicies*. *R.* 2 *Leo.* 34. 210. 21 *H.* 6. 34.

But in *re-disseisin* the sheriff is judge, and the proceedings are of record, upon which error lies. 6 *Co.* 11. b. *Vide Affise*, (F 1, &c.)

So, if a plea be there by *justicies*, the sheriff ought to be there in person, and cannot make a deputy: for if he does, the proceedings will be *coram non judice*, and void. *R.* 2 *Leo.* 34. 210.

Yet if the court is alleged to be held before the sheriff, it seems to be well. 21 *H.* 6. 34.

So, in the tourn the sheriff is judge. 6 *Co.* 12. a.

(C 3.) When it shall be held.

By *ft. M. Ch.* 9 *H.* 3. 35. *nullus comitat. teneatur nisi de mense in mensem, & ubi major terminus esse solebat, major fiet*; which was an affirmation of the common law. 2 *Inst.* 70.

And by the *ft.* 2 & 3 *Ed.* 6. 25. no county court shall be deferred longer than from month to month, and so be kept every month.

And the computation shall be by lunar months. 2 *Inst.* 71. *Vide Ann* (B).

[All county courts held for the county of York, or any other county courts that used to be held on Monday, shall be called and begun on Wednesday, and not otherwise. 7 & 8 *W.* 3. c. 25. s. 9.]

(C 4.) At what Place.

A county court may be held at any place within the county, if it be not appointed by statute in a place certain.

[The county court for *Suffex* shall be kept alternately at *Chichester* and *Lewes*. 19 *H. 7. c. 24.*]

[The county court of *Northumberland* shall be kept only in the town or castle of *Alnwick*. 2 & 3 *Ed. 6. c. 25. f. 3.*]

(C 5.) The Jurisdiction of the County Court.

(C 5.) *By justices.*] The county court may hold plea by *justices* of any value above 40 *s.* for it is in the nature of a commission. 2 *Inst.* 312. 4 *Inst.* 266. Tho' the value be 1000 *l.* 21 *H. 6. 34.*

As in debt, detinue, trespass, and other personal actions. 4 *Inst.* 266. *F. N. B. 85. F.*

Tho' the trespass be *vi et armis*. 2 *Inst.* 312.

In annuity. 4 *Inst.* 266.

Dower, *unde nihil habet*, and *quarentinâ habend.*

So, in divers real actions the sheriff may hold plea by *justices*: as, in admeasurement of dower, or pasture. 4 *Inst.* 266. 2 *Inst.* 312.

In a writ of *mesne*, of customs and services. 4 *Inst.* 266.

In a *quod permittat*, nuisance, &c. 4 *Inst.* 266. *Vide Quod permittat*, (D 1.)

In *rationab. divisio*, and *curiâ claudendâ*. 4 *Inst.* 266.

In *secta ad molendinum*. *Ibid.*

In right patent, or right of ward.

In *nativo habendo*. 2 *Inst.* 312.

In *plegiis acquietandis*.

So, in debt for tithes. *Dub. 1 Lev. 253.*

(C 6.) *By appeal.*] So, the county court shall hold plea in an appeal of robbery, rape, or other felony. *Vide Appeal (F).*

(C 7.) *By replevin.*] So, the county court may hold plea by writ of *replevin* of any value; for the writ is in nature of a commission. 2 *Inst.* 312. *Vide Pleader*, (3 K 1, &c.)

So, in an *homine replegiando*.

So, a writ of re-caption may be sued in the county court before the sheriff and coroners.

Vide post. (C 8.)

(C 8.) *By plaint.*] So, the county court holds plea by plaint in debt, detinue, or other personal action, (not being *vi & armis*), under the value of 40 *s.* 2 *Inst.* 312. 4 *Inst.* 266.

So, if the debt was originally above 40 *s.* if the plaintiff by his declaration acknowledges the receipt of so much as reduces the debt under 40 *s.*

So, it may hold plea by plaint of trespass, if it be not *vi & armis*: as, of a battery. 2 *Inst.* 312.

So, by the *st. of Marl.* 52 *H. 3. 21.* the county court may hold plea by plaint in *replevin*, tho' the cattle are of the value of 20 *l.* 2 *Inst.* 139. 312. *Vide Pleader*, (3 K 2.)

But

But the county court cannot hold plea by plaint, in debt, detinue, or other personal action, of the value of 40 s. or above: for *placita de debitis aut catallis qua summam 40 s. attingunt aut excedunt sine brevi domini regis placitari non debent.* 2 *Inst.* 312. 4 *Inst.* 266. *Vide Copyhold*, (R 14.)—*Courts*, (B 3.)

And it ought to appear in the declaration to be under 40 s. for if he counts to more, tho' the verdict finds less, he shall not have judgment. 2 *Inst.* 312.; or if he has judgment, it shall be reversed. R. 2 *Mod.* 206.

Neither can he divide a debt, and by several plaints demand under 40 s. in each. 2 *Inst.* 312.

Nor, can he join several debts in the same plaint, if they all amount to 40 s. though each severally be under that value. R. 1 *Vent.* 65. 73.

Nor can he acknowledge satisfaction of part, falsely, to reduce the debt under 40 s. R. *Pal.* 564.

[An action cannot be brought in the county court, even for a less sum than 40 s., unless both the defendant reside, and the cause of action arise within the county, i. e. within the jurisdiction of the court. *Welfb v. Troyte*, C. P. E. 32 *Geo.* 3. 2 *H. Bl.* 29. *Tubb v. Woodward*, B. R. H. 35 *Geo.* 3. 6 *T. R.* 175. *Smith v. O'Kelly*, C. P. T. 37 *Geo.* 3. 1 *Bos. & Pull. Rep.* 75. *Busby v. Fearon*, B. R. E. 39 *Geo.* 3. 8 *T. R.* 235.]

[And where those circumstances do not concur, the action must be brought in a superior court. *Ibid.*]

So, the county court cannot hold plea *vi & armis*; for then a fine is due to the king, which cannot be assessed in a court not of record; and therefore, it shall not hold plea by plaint and trespass *vi & armis*. 2 *Inst.* 311. 4 *Inst.* 266.

Nor, of wounds and mayhem. 2 *Inst.* 312.

Nor, for deceit or maintenance.

Or, forging of a false deed.

So, it shall not hold plea in account against any, as receiver, tho' it be under 40 s. for the sheriff cannot assign auditors, who are judges of record. 2 *Inst.* 380.

Nor, for debt upon a record or specialty.

So, it cannot hold plea, by plaint, concerning freehold.

Nor, in dower. 2 *Lev.* 123.

And therefore, if a man in a plaint in *replevin*, justifies, avows, or makes consuance as in the freehold of B., the jurisdiction of the county court is ousted. 3 *Lev.* 196. 204.

So, it cannot hold plea of charters for land of freehold or inheritance. 2 *Inst.* 311.

Or, in an *homine replegiando*, where any one is committed for the death of a man, by command of the king, or of the justices, or for the forest. 2 *Inst.* 186, 7.

If the county court holds plea where it has no jurisdiction, the proceeding is *coram non judice*, and void, and trespass lies against any, who act under the process of the court. 3 *Lev.* 203.

And, if freehold, or other plea, which ousts the jurisdiction, be pleaded, all the subsequent proceedings are void. R. 3 *Lev.* 204.

And, a *superfedeas* may be granted to such process. F. N. B. 239. D. H.

Every

Every resiant within the county ought to do suit at the county court.

And for default of appearance when summoned, he shall be amerced.

So, he may have land by the tenure of doing suit at the county court.

Vide Dismes, (M 5.)

(C 9.) Process.

(C 9.) *Mefne.*] Process in the county court shall be by summons, attachment and distress infinite in all personal actions by plaint or *justicies*, except in trespass.

In trespass, it shall be by attachment and distress infinite.

And the sheriff may by his precept award summons of the defendant by his goods, returnable in two or three days at his discretion.

4 Inst. 266.

And the summons may issue two or three days before the court.

Ibid.

And shall be directed to a bailiff. *Ibid.*

And the sheriff shall make the precept in his own name, though the suitors are judges. *R. 3 Lev. 203.*

And it shall be to the sheriff's bailiffs; not to special bailiffs. *Semb. Lut. 1413.*

If the defendant does not appear upon summons, an attachment shall go against him, (and in trespass it is the first process,) directed to a bailiff *quod pon. per vad. & salv. pleg., &c.* *Vide Process, (D 6.)*

Upon which the bailiff attaches him by pledges, or his goods.

Or, it is sufficient, that he warns him to appear, if he be returned warned.

The bailiff shall keep the goods attached till the next court, and if the defendant then makes default, they are forfeited. *Vide Process, (D 6, 7.)*

If the defendant does not appear upon the attachment, a *distingas* shall go, by which the bailiff shall distrain the goods of the defendant, and keep them till he appears; and if he makes default, they are forfeited. *Vide Process, (D 6, 7.)*

And so *distingas in infinitum* till the defendant appears.

But a *capias* does not lie in the county court.

(C 10.) *Judicial.*] After judgment, process for damages and costs shall be made by *levari facias*.

But, a *levari facias* out of the county court ought to be *de bonis & catallis* only, and not *de terris & catallis*. *Semb. Lut. 1413.*

And the goods taken shall not be sold without a custom alleged for it. *Semb. Lut. 1413.*

Vide Copyhold, (R 18.)

(C 11.) Trial.

If a suit be in the county court by *justicies*, the trial shall be by a jury.

So, by prescription, it may be in a suit by plaint.

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But,

But, without a prescription for it, in a suit by plaint, the trial shall be by wager of law, or examination of witnesses.

[Statute 23 G. 2. c. 33. empowers county clerk, and suitors in county court of *Middlesex*, to determine any plaint under 40*s.* in a summary way, and regulates the time of holding, and other methods of proceeding.]

(C 12.) Plaint.

Every plaint ought to be entred in writing *sedente curiâ*.

And the plaintiff must be present in person, or by attorney.

And shall find pledges. *Vide Pleader*, (3 K 5.)

(C 13.) Execution.

After judgment, execution shall be done, and the damages and costs levied (if the custom allows it) by a *levari facias*. *Vide ante*, (C 10.)

If the custom does not allow a *levari facias*; it shall be only by *distingas*, and detainer of the goods distrained as a pledge till the costs and damages are satisfied.

If the sheriff delays execution, a writ *de executione judicii* may be directed to him out of *Chancery* to do execution.

And thereupon, an *alias* and *pluries*, and attachment against the sheriff.

Foreign County.

Vide Justices, (Y 14.)—*Pleader*, (S 9. 11.—3 M 3.)

In what County an Action shall be sued.

Vide Action, (N 1, &c.)—*Action upon the Case for a Conspiracy*, (C 2.)

—*Action upon the Case for a Deceit*, (F 2.)—*Appeal* (E).

County Clerk.

Vide ante, (C 1.)

Coroner in a County.

Vide Officer, (G 2, &c.)

Knights of the Shire.

Vide Parliament, (D 5. 11.)

Posse Comitatus.

Vide Viscount, (C 2.)

Vide Admiralty, (F 2.)—*Dismes*, (E 4.)—*Justices of Peace*, (B 67.)

—*Leet*, (O 3.)—*London* (H).

COURTS.

The Court of Chancery.

Vide Chancery.

The Courts of Scotland.

Vide Scotland, (D 10, &c.)

The Court of Parliament.

Vide Parliament.

The Courts of County Palatine.

Vide Franchises, (D 1, &c. 9.)

The Courts of the Cinque Ports:

Vide Franchises, (E 2.)

The Court of Antient Demefne.

Vide Antient Demefne, (G 1, &c.)

The Court-Baron.

Vide Copyhold, (R. 1, &c.)

The County Court.

Vide County, (C 1, &c.)—Dismes, (M 5.)

The Customary-Court.

Vide Copyhold, (R 2, &c.)

The Courts in a Forest.

Vide Chase, (R 1, 2.)

The Hundred-Court.

Vide Hundred (B).—Dismes, (M 5.)

The Lord of a Manor's Court.

Vide Copyhold, (P 1.)

The Courts in the Plantations.

Vide Navigation, (G 2.)

The Court of Pye-Powders.

Vide Market, (G 1, 2.)

The Court of Commissioners of Sewers.

Vide Sewers (D).

The Court of the Tourn, or Leet.

Vide Leet.

(A) All Judicature remains in the King's Courts.

THE king has distributed all his power of judicature to divers courts. 4 *Inst.* 70.

And, therefore, the king himself cannot administer justice except by his justices. 4 *Inst.* 71. *R.* 12 *Co.* 64.

And if any one renders himself to the judgment of the king, it is of no effect, if he does not render himself to the king's court. 4 *Inst.* 71.

If the king himself sits in *B. R.* justice shall be administered by the judges. 4 *Inst.* 73. 12 *Co.* 64.

[And every person is bound by the judicial acts of a court having competent authority, and during the existence of such judicial act the court will protect every person obeying it. 3 *T. R.* 129.]

[And every court is bound to take notice that it has no jurisdiction in every case where a want of jurisdiction is apparent. 2 *T. R.* 644.]

(B) The King's Bench.

(B 1.) The Extent of its Jurisdiction.

THE King's Bench is held *coram rege*. 4 *Inst.* 71. 73.

[If by the king's pardon security is directed to be given, *qual. curia de banco nostro dirigeret*, it is the King's Bench. *Rex v. Leonard*, *P.* 6 *G.* *Str.* 302.]

And antiently it was attendant upon the palace, or court of the king. 4 *Inst.* 71. 73. *Mad.* 539. 543.

The justices of *B. R.* have supreme authority. 4 *Inst.* 73.

And, therefore, have properly jurisdiction in all pleas of the crown; as high treason, felony, &c. 4 *Inst.* 71.

In all errors in fact, or in law, upon judgments by any other court of record in the kingdom, except the *Exchequer*. 4 *Inst.* 71. *Vide Pleader*, (3 *B* 3.)

Though the felony, &c. is committed within the king's palace, for the *st.* 33 *H.* 8, 12. does not take away their jurisdiction. *R.* 2 *Jon.* 53.

So, *B. R.* may hold plea, by original out of *Chancery*, in trespass *vi & armis*. 4 *Inst.* 71.

So, in *replevin*. 4 *Inst.* 71. 2 *Inst.* 23.

In *rescous*, forcible entry, &c. 2 *Inst.* 23.

In trespass, &c. *vi & armis* under 20*s.* or of whatever value. *R.* 3 *Mod.* 275. *Carth.* 108.

So, in ejectment, and all actions *vi & armis*. 2 *Inst.* 23.

So, in *quare impedit* by the king, though it be not *vi & armis*.

4 *Inst.* 71.

And in every other action brought by the king. 2 *Inst.* 23. 2 *Rol.* 167. l. 5.

So, *B. R.* may hold plea by bill, in debt, *detinue*, covenant, *assumpsit*, account, and all personal actions, where the plaintiff has privilege as an officer, or clerk of the court. 4 *Inst.* 72.

Or, where the defendant has privilege as an officer, or clerk of the court, or being in *custodia mareschalli*. 4 *Inst.* 71. 2 *Inst.* 23.

Whether the defendant be in custody by commitment, or by *latitat*, bill of *Middlesex*, or other process. 4 *Inst.* 72.

Though it be in an action upon a statute, *valore maritagii*, &c. 1 *Rol.* 536. l. 50. 537. l. 45. *Vide Action upon Statute.*

So, if error be in *B. R.* upon a judgment in *C. B.* in a plea of abatement, and the judgment be reversed, *B. R.* may then proceed in the original cause. 4 *Inst.* 72. 2 *Inst.* 23.

So, *B. R.* may hold plea in an assise of *novel disseisin*; for it is a plaint, and not restrained by *M. Ch.* 9 *H.* 3. 11. which enacts that common pleas *non sequantur curiam nostram*. *Ibid.*

In a *scire facias* to repeal the king's patent. 4 *Inst.* 72.

So in *re-disseisin*, &c. 2 *Inst.* 23.

So, *B. R.* has jurisdiction to correct and reform all errors and misdemeanors extrajudicial, which tend to the breach of the peace, or oppression of the subject. 4 *Inst.* 71.

And therefore, if a corporation or others disfranchise or remove an officer, &c. without cause, or wrongfully refuse to execute a power or authority intrusted to them, *B. R.* will grant a *mandamus*. 4 *Inst.* 71. *Vide Franchises*, (F 31, &c.)—*Mandamus* (A—B).

If a court, temporal or spiritual, exceeds its jurisdiction, *B. R.* will grant a prohibition. 4 *Inst.* 71. *Vide Prohibition.*

If any be imprisoned without just cause or authority, it will grant an *habeas corpus*. 4 *Inst.* 71. *Vide Habeas Corpus.*

So, *B. R.* is superior to the justices in *eyre*. 4 *Inst.* 73.

The justices of *B. R.* are the sovereign justices of *oyer and terminer*, gaol-delivery, and of the peace, &c. within the realm. 4 *Inst.* 73.

They are the sovereign coroners within the realm. *Ibid.*

And therefore, if *B. R.* sits in any county, the authority of justices in *eyre*, or other justices of *oyer and terminer*, gaol-delivery, &c. in the same county, ceases immediately. *Ibid.*

And *B. R.* may do all that the coroner, &c. can do. *Ibid.*

Yet if an indictment be removed before special commissioners of *oyer and terminer*, they may proceed upon it, tho' *B. R.* sits in the same county. 4 *Inst.* 73.

So, if an indictment be taken in *Middlesex* in the vacation, tho' *B. R.* sits there the next term, when *B. R.* is adjourned, special commissioners of *oyer and terminer* may proceed upon it. *Ibid.*

[By *st.* 25 *G.* 3. c. 18. from May 3, 1785. when any session of *oyer and terminer*, and gaol-delivery shall have been begun to be holden for the county of *Middlesex* before the *essoign-day* of any term, it may be continued to be holden, and the business finally concluded, notwithstanding the happening of such *essoign-day*, or the sitting of *B. R.* at *Westminster*, or elsewhere in the county of *Middlesex*]

So, *B. R.* is so high, that a record of that court shall not be removed, if it be not warranted by act of parliament, but only the transcript of it. 4 *Inst.* 73. *Vide Pleader*, (3 B 13.)

So, a record removed into *B. R.* shall not be afterwards remanded. 4 *Inst.* 73. 1 *Rol.* 534. l. 45-50.

[Where the proceedings originate in an inferior court, judgment must be given there; but where the proceedings are commenced in *B. R.* and the record is sent down to be tried below, the defendant is not properly convicted till the record is returned into *B. R.* The court of *Nisi Prius* is merely an emanation from *B. R.* and the proceedings must be returned into *B. R.* before judgment can be given. *Per* *Ld. Kenyon C. J.* *Dyer v. Hainsworth*, *B. R. E.* 30 *Geo.* 3. 3 *T. R.* 614.]

[A judge of *B. R.* has power to grant warrants to be executed by all constables, &c. through *England*; and, on disobedience to it, attachment shall issue. *Rex v. White*, *T.* 7 *G.* 2. *B. R. H.* 42.]

[But the King's Bench cannot bail a man committed for a contempt of the House of Commons. 1 *Wilf.* 299.]

(B 2.) When *B. R.* has not Jurisdiction.

(B 2.) *Of common pleas.*] But by the *st. M. Ch.* 9 *H.* 3. 11. all common pleas are restrained to *C. B.* 2 *Inst.* 22. 4 *Inst.* 71. 1 *Rol.* 536. l. 35.

As, *quare impedit*, and *quare incumbavit*. 1 *Rol.* 563. l. 40.

So, all real actions.

So, if a *quare impedit* be removed by error into *B. R.* and judgment affirmed; a *quare incumbavit* does not lie in *B. R.*, for it is a new original. 1 *Rol.* 537. l. 40.

So, an action of debt upon a statute.

So, an action upon the statute of *Winton*, against the hundred, does not lie by original in *B. R.* for it is a common plea. *Semb.* 1 *Rol.* 536. l. 45. *Vide Action upon Statute*, (E 1.)

(B 3.) *If the damages be not alleged at 40s.*] So, by the *st. Gloc.* 8. a writ of trespass a man shall not have before the justices, if he does not affirm the goods taken away to be of the value of 44s. at the least. *Vide County*, (C 8.)

And therefore, generally, debt, *detinue*, covenant, &c. which does not amount to 40s. does not lie in a superior court. 2 *Inst.* 311. [4 *T. R.* 495. 499.]

But this does not extend, where the debt or damages are alleged at 40s. tho' the verdict finds a less sum. 2 *Inst.* 312. *R.* 19 *H.* 6. 8. b.

Nor, to trespass *vi & armis*, or other action, in which an inferior court has not jurisdiction.

Nor, to an action for costs, &c. given by a subsequent statute, tho' they are under 40s. *C. Cro. El.* 96.

[If the cause of action appears, on the face of the declaration, to be only 20s. the court will stay proceedings; but not on affidavit, that the debt is such, if plaintiff demands more. *Oulton v. Perry*, *M.* 5 *G.* 3. 3 *B. M.* 1592. *Barnes*, 497.]

[If it appears to the court, though not on the record, that the cause of action does not amount to 40s. they will on motion stay the proceedings]

ceedings before trial. *Stean v. Holmes*, C. P. E. 11 Geo. 3. 2 Bl. 754. *Kennard v. Jones*, B. R. M. 32 Geo. 3. 4 T. R. 495.]

[So, upon an affidavit made by the defendant, and not contradicted by the plaintiff, that the debt did not amount to 40s. the court stayed proceedings. *Wellington v. Arters*, B. R. M. 33 Geo. 3. 5 T. R. 64.]

[Debt for 20s. per ann. rent, damages 100s. is within the jurisdiction. *Barnes*, 497.]

(B 4.) Officers of B. R.

(B 4.) *The judges, &c.*] The chief justice of B. R. was antiently constituted by patent; but 25 Ed. 1. and from thenceforth, he was constituted by writ. 4 Inst. 74, 5. *Vide post*. (C 2.)

The other justices there are all made by patent. 4 Inst. 75.

And none but the chief justice can be made a justice, unless by patent, or commission. *Ibid*.

None can be a judge, if he be not before a serjeant at law. *Ibid*.

A grant of chief justice cannot be made to two. *Hob*. 153.

A judge of B. R. was antiently, and of later times constituted *durante bene-placito*. 4 Inst. 75. (*By the st. 12 & 13 W. 3. 2. Quamdiu se bene gesserint.*) [*Vide Justices*, (C 2.)]

A judge of B. R. may be discharged by writ. *Ibid*.

The coroner, or clerk of the crown, shall be granted by the chief justice of B. R.

So, the chief clerk of the office *ad irrotuland. placita in B. R.* *Skin*. 354.

(C) The Common Bench.

(C 1.) The Jurisdiction.

THE C. B. seems to have been severed from the *curia regis*, 7 R. 1. or *tempore Joh.* and the severance was established by M. Ch. 17 Joh. & 9 H. 3. *Mad*. 539, &c.

And after the st. M. Ch. 9 H. 3. 11. all common pleas were determined in C. B. 2 Inst. 21. 4 Inst. 99.

And therefore all real actions shall be there determined. 4 Inst. 99.

All fines and common recoveries shall be there levied, and suffered. *Ibid*.

So, every action by original, real, personal, and mixt, may be sued there. *Ibid*.

So, where the plaintiff or defendant has privilege, as an officer, minister or clerk of C. B. the action shall be there by bill, without an original. *Ibid*.

So, C. B. may award a prohibition to a temporal or spiritual court, which exceeds its jurisdiction, without original, or plea depending before them. 4 Inst. 99, 100. R. 12 Co. 109. *Vide Prohibition*.

So, it may award an *habeas corpus*, if any be imprisoned without cause. *Vide Habeas Corpus*.

So, C. B. has jurisdiction for the punishment of their own officers and ministers, 4 Inst. 100. [*Vide Habeas Corpus* (A).]

(C 2.) Officers of C. B.

(C 2.) *The judges.*] The judges of C. B. are all made by patent. 4 Inst. 100. *Vide ante*, (B 4.)

The king himself cannot be chief justice there.

(C 3.) *Custos brevium, and chirographer.*] The chief clerk of C. B. is the *custos brevium*, who is appointed by the king's patent. Dy. 176. a.

So is the chirographer.

(C 4.) *Prothonotary.*] There are three prothonotaries in C. B.

The chief justice grants the office of chief prothonotary, and may revoke it, if he be insufficient, without the other justices. Dy. 150. b.

(C 5.) *Exigenter.*] So, the office of exigenter is, by prescription, to be appointed by the chief justice; and a grant of the office by the king, tho' during a vacancy of the office of chief justice, will be void. R. Dy. 175.

(D 1.) The Court of Exchequer.

THE court of *Exchequer* is an original court, time whereof, &c. held without commission as well as B. R. and C. B. 4 *Inst.* 103. It began since the Conquest. *Mad.* 121.

In the *Exchequer* are seven courts: 1. The court of pleas. 2. Of accounts. 3. Of receipt. 4. The court of *Exchequer Chamber* for matters of law adjourned *propter difficultatem*. 5. For error in the court of *Exchequer*. 6. For errors in B. R. by the *st.* 27 *El.* 8. 7. For causes in equity. 4 *Inst.* 119.

(D 2.) The Court of Pleas.

The court of pleas is held *coram baronibus in Scaccario*. 4 *Inst.* 109. *Vide Dett.* (G 14.)

And has jurisdiction of all causes which concern the king's profit. 4 *Inst.* 113.

As, of debts or duties due to the king. 4 *Inst.* 103. 110. 112. 2 *Inst.* 551.

So, in matters which relate to tenures of the king *in capite*, or as of an honour, or manor, &c. 4 *Inst.* 110.

So, in matters which concern the lands, rents, franchises, hereditaments, goods, and chattels of the king. 4 *Inst.* 112. 2 *Inst.* 551.

By the *st.* 33 *H.* 8. 39. the court of *Exchequer*, &c. shall have full authority to hear and determine all debts, *detinues*, trespasses, accounts, wastes, deceits, negligences, defaults, contempts, complaints, riots, suits, forfeitures, offences, &c. which shall grow, &c. upon any matter, &c. assigned, committed, &c. to the several orders of the same court, &c. or which may concern the same, where the king shall be only party.

And all states for years between party and party concerning the premises.

And all estates, rights, titles, and interests, as well of inheritance as freehold, &c.

So, the court of pleas in the *Exchequer* has jurisdiction, when the plaintiff or defendant has privilege as an officer or minister of the court. 4 *Inst.* 112. 2 *Inst.* 551. *Pl. Com.* 208. a.

So, if the defendant be a prisoner to the court of *Exchequer*, he shall be privileged to be sued there in all personal actions. 2 *Inst.* 551.

So,

So, an accountant, or other who has a title to privilege there.

2 *Inst.* 551. *Pl. Com.* 208. a.

So, a servant to an officer there; as, to the treasurer, &c. *Sav.* 10.

So, if the plaintiff be debtor to the king, he may sue in the *Exchequer* against any, for a debt or duty to him, upon a suggestion. *Quominus*, &c. 2 *Inst.* 551. 4 *Inst.* 111, 112. *Pl. Com.* 208. a.

So, the king's farmer for tithes, parcel of the possessions leased to him; tho' the right of the tithes be in debate. 1 *Rol.* 538. l. 40. *Hard.* 177.

So, a suit between a parson and vicar for tithes, where the king is patron, ought to be in the *Exchequer*. *R.* 1 *Rol.* 538. l. 45.

So, a prohibition to a libel in the spiritual court for tithes of a copyholder of the king's manor. *R.* 1 *Rol.* 539. l. 10.

So, trespass, &c. against him who distrains for an amerciamment, &c. in the king's manor. *R.* 1 *Rol.* 539. l. 15.

Ejectment by him, who claims title by an extent in aid. *R.* *Hard.* 193. 176.

Or, by him who has privilege. *Sav.* 10. 12.

Every action which concerns the king's revenue immediately. *R.* *Hard.* 193. 4 *Inst.* 112.

And if begun in another court, it may be removed. *Hard.* 176.

[The court will remove an action brought in another court for the seizure of a ship, tho' no information is filed here; but after information tried here, and verdict for defendant, the court will not remove an action brought in another for the seizure. *Bercholt v. Candy*, in *Sc. H.* 1718, *Bunb.* 34.]

[The court will remove *trover* brought against an officer for goods seized and condemned, and also a great coat, saddle, &c. on affirmation that they were not seized, and only thrown in for a colour. *Penny v. Bailey*, *M.* 1731, *Bunb.* 309.]

[But the court will not remove an action brought in *B. R.* for taking ropes and cordage, against an officer who had seized two cables, one of which only was foreign, (and actually condemned in this court). *Barkley v. Walters*, *M.* 1731, *Bunb.* 306.]

So, false imprisonment or other action against an under-sheriff may be in the *Exchequer*; tho' the sheriff be the officer of the court: for it takes notice also of the under-sheriff. *R.* 1 *Rol.* 539. l. 30.

So, if a man having privilege in the *Exchequer*, begins a suit there, and afterwards sues the same defendant, for the same cause, in *B. R.* it shall be a contempt. *Semb.* *Sav.* 14.

So, the plaintiff in any case may sue for tithes, &c. in the *Exchequer*, when he pays tenths and annates to the king. *R. cont.* 3 *Leo.* 258.

So, he may have debt there upon the *ft.* 2 & 3 *Ed.* 6. 13. for not setting out his tithes. *Sav.* 131.

But after the *ft. of M. Ch.* 9 *H.* 3. 11. explained by the *ft. Art. sup. Char.* 28 *Ed.* 1. 4. common pleas (except in case of privilege) shall not be sued in the *Exchequer*. 2 *Inst.* 23. 551. 4 *Inst.* 113. 1 *Rol.* 538. l. 50. 539. l. 5. *Mad.* 141. 145. 544. 594. *Pl. Com.* 208.

And an accountant shall not have privilege to be sued there, if he has not entred into his account. 4 *Inst.* 112.

So, a collector of tithes shall not. *Ibid.*

So,

So, the king's debtor shall not have the privilege of the *Exchequer*, if he be before sued elsewhere. 4 *Inst.* 112. *Dy.* 328.

Or, if his debt be discharged. *R. Sav.* 15. But *Semb. cont. Sav.* 33. *R. Sav.* 51.

So, if a suit be elsewhere, upon a collateral matter, which does not directly concern the king's revenue, it shall not be stayed upon pretence of privilege in the *Exchequer*; as, if false imprisonment be in *B. R.* for an imprisonment for a fine imposed by commissioners of excise. *R. Hard.* 193.

So, a defendant, sued there by information upon a penal statute, shall not have privilege to sue there, if he be not convicted, or does not confess the information. *Sav.* 53.

So, an officer, who becomes party by covin in order to obtain privilege, shall be disallowed. *Sav.* 12.

So, an executor has no privilege to sue there, if he only alleges that the defendant does not pay, *quo minus*, &c. he is able to pay his debt to the king; for he cannot pay it with his testator's money. *Sav.* 39.

So, an information by a common informer does not lie in the *Exchequer* upon a penal statute, which gives remedy only before justices of peace, *oyer and terminer*, assize, &c. *R. Sav.* 6.

Otherwise by the attorney-general. *Sav.* 134.

Semb. that it lies if no court is directed by the statute. *Hard.* 420.

So, a plaintiff in a suit by *English* bill, or in the *Exchequer-Chamber*, has no privilege to be sued in the *Exchequer* only. *Sav.* 51.

So, a servant to an officer in the *Exchequer* shall not have privilege there, if he be not attendant upon his person as a menial servant, or upon his office. *Bro. Privilege*, 8. 16.

If a suit be in the *Exchequer*, where the parties have no privilege, &c. it will be *coram non judice*. *Sav.* 36.

(D 3.) The Court of Accounts.

The barons of the *Exchequer* are the sovereign auditors of the kingdom. 4 *Inst.* 115.

This court is held *coram thesaurario & baronibus*.

And may audit all accounts of officers, and others accountant to the king. 4 *Inst.* 113. *Mad.* 628.

Which may be audited in court, or by commission upon the *ſ.* 6 *H.* 4. 3. 4 *Inst.* 117.

And ought to be given upon oath. 4 *Inst.* 113.

Divers officers ought to account annually; as, the treasurer of *Ireland*, keeper of the wardrobe, &c. 4 *Inst.* 113. 117.

So, a sheriff, escheator, aulnager, comptroller, &c. *Vide Viscount*, (G 1, &c.)

It is more for the benefit of the king, that the account be taken by the court, than by commission. 4 *Inst.* 113.

But the treasurer of the king's chamber shall account only to the king, and not in the *Exchequer*. *Ibid.*

As to account before auditors assigned by the court, or in equity, *vide Accompt*, [E 7, &c.]—*Chancery*, (2 A 1, &c.)

As to account in the *Exchequer* by a sheriff, *vide Viscount*, (G 1, &c.)

(D 4.)

(D 4.) The Court of Receipt.

The court of receipt is entirely under the treasurer. *Ld. Som. Arg. 54.*

The principal officers of this court are, the treasurer, and chamberlains. *Sav. 38.*

Under them are the clerk of the pells, and four tellers, and the auditor of the receipt. *Vide post. (D 14, 15.)*

By the *st. 8 & 9 W. 3. 28.* a teller, on receipt in his office of any money, &c. shall without delay throw down into the tally-court (if the officers be there) a bill or bills for the money, but not till the receipt, whereby a tally may be struck for it.

And the first clerk in the offices of the auditor of the receipt, of the clerk of the pells, and of the four tellers, shall be sworn to performance of duty.

The auditor of receipt, for fee, shall enter and inrol all patents and letters of privy seal for issuing the king's treasure, and draw the orders, or make the debentures for issuing it, and keep entries thereof, &c. shall weekly take the teller's accounts, and make certificates of all receipts, issues, and remains, &c. and of all monies imprest, and transmit the imprest-rolls to the king's remembrancer, &c.

The clerk of the pells shall inrol all such patents and letters of privy-seal, record the teller's receipts and issues, certify them to the treasury, examine the imprest, certificates, and rolls, &c.

[It is no office of record, except in matters relating to the king's revenue. *Colegate v. Juson, M. 1744, 3 Atkyns, 197.*]

(D 5.) The Exchequer-Chamber.

(D 5.) *For causes of difficulty.*] If the court of *B. R.* or *C. B.* be equally divided, or apprehend great difficulty in the case, it may be adjourned into the *Exchequer-Chamber*, to be argued by all the justices of England. *Co. L. 71. b.*

And this was by the *st. 14 Ed. 3. 5.*, for before it was determined by parliament. *Co. L. 72. a.*

And now by the same statute, if the justices in the *Exchequer-Chamber* are equally divided, it shall be determined at the next parliament by a prelate, two earls, and two barons, with the advice of the lords chancellor and treasurer, the judges, and other of the king's council as shall be deemed convenient. *Co. L. 71, 2.*

If after adjournment a judge dies, the cause goes on. *2 Bul. 146, 7.*

If after argument another judge be made, he shall not give his opinion. *2 Bul. 147.*

But it shall not be adjourned to the *Exchequer-Chamber* upon motion before argument, and after argument only, if the court be divided, or for difficulty adjourn it of themselves. *R. 2 Bul. 146, 7.*

(D 6.) *For errors.*] So, by the *st. 31 Ed. 3. 12.* error in the *Exchequer* shall be examined in the *Exchequer-Chamber* before the chancellor and treasurer, taking to them justices and sages, whom they think meet, and calling before them the barons to hear the causes of their judgment. *Vide Pleader, (3 B 4, 5.)*

[After this statute, if the court was adjourned, and at the day of adjournment, both the lord chancellor and lord treasurer did not attend,

tend, the writ of error was discontinued, and the plaintiff in error obliged to begin anew,]

[To remedy this, it is enacted by *ft. 31 El. c. 1. f. 1.* that the not coming of the lord chancellor, and lord treasurer, or of *either* of them, at the day of adjournment, shall not be a discontinuance of the writ of error: but if *both* the chief justices of either bench, or any *one* of the said great officers, be present at the adjournment day, the suit shall proceed in law to all intents and purposes, as if both these officers were present.]

[But this statute did not provide a remedy for the absence of these officers at the day of the return of the writ.]

[Therefore it is provided, by *ft. 16 Car. 2. c. 2. f. 2.* that if *both* the chief justices, or *either* of them, or any *one* of the said great officers be present at the day of the return of the writ, it shall be no abatement or discontinuance, but the suit shall proceed as if both the lord chancellor and lord treasurer were present.]

[But both these statutes having provided that no judgment should be given, unless *both* the lord chancellor and lord treasurer should be present; it was enacted by *stat. 20 Car. 2. c. 4.* that judgment might be given in writs of error in presence of the lord keeper, notwithstanding the absence of the lord treasurer.]

And by the *ft. 27 El. 8.*, error in *B. R.* in debt, *detinue*, covenant, account, action upon the case, trespass, and ejectment, shall be examined there by the justices of *C. B.* and barons of the *Exchequer*.

[By *ft. 31 El. c. 1. f. 2.* any *three* of the judges and barons may receive and continue writs of error from the King's Bench.]

[But by *f. 3.* no judgment shall be given in such error, unless by the full number of *six* justices and barons.]

By the *ft. 31 Ed. 3.* the chancellor and treasurer of *England* are the judges, and not the treasurer of the *Exchequer*. *4 Inst. 105. Vide Pleader, (3 B 5.)*

And therefore, the writ of error ought to be directed to the treasurer of the *Exchequer* and barons, to bring the record of the judgment before the lord treasurer and chancellor; for the treasurer of the *Exchequer* and the barons have the custody of the records there. *4 Inst. 105. Sav. 36. 39.*

Before the *ft. 31 Ed. 3. 12.* all errors in the *Exchequer* were redressed in parliament, or by the king's commission. *4 Inst. 105, 6.*

[The *Exchequer-Chamber* may try a release of errors, and award a *venire* under the seal of the court of *Exchequer*. *Gomez Serra v. Munez, H. 2 G. 2. Str. 821.*]

(D 7.) *For causes in equity.*] A court of equity has been held in the *Exchequer-Chamber*, time whereof, &c. before the lord treasurer, chancellor, and barons, and did not begin by the *ft. 33 H. 8. 39. Semb. 4 Inst. 119. Vide 4 Inst. 109.*

And the jurisdiction extends to all causes which concern the king, or his profit. *4 Inst. 118.*

Or, where the plaintiff or defendant has privilege there. *Vide ante, (D 2.)*

So, if there be a suit by one, who has privilege, there may be a cross bill without privilege. *R. Hard. 160.*

There may be a suit for tithes by *Engl's* bill in the *Exchequer-Chamber*. *Vide Difmes, (M 13, &c.)*

So,

So, every cause, which may be sued in the duchy-court, may be commenced in the *Exchequer-Chamber*. *Hard.* 171.

So, a bill in the nature of false judgment may be brought in the *Exchequer-Chamber*, for reversal of a judgment against a copyholder in the king's manor. *R. 1 Rol.* 539. *l.* 20. *Vide Copyhold*, (P 2.)

So, a bill for a thing, which concerns the inheritance of the king, may be brought here; for it is a court of revenue, as well as a court of equity. *Hard.* 50.

So, upon a bill here, a mill erected within the king's manor, where the king has the multure to his mill there, may be removed. *Hard.* 175.

And if a mill be erected out of the manor, tho' it be not removed, grist there by the king's tenants shall be restrained. *R. Hard.* 175.

But the mill shall not be demolished. *Hard.* 175. 184.

So, any nuisance to the inheritance of the king, may be there redressed. *Hard.* 162.

So, by the *st.* 33 *H.* 8. 39. If any, against whom a debt or duty is demanded for the king, can shew any matter in law or good conscience in discharge, &c. the court shall have power to discharge, &c. And therefore, he may have relief by *English* bill, as well as by plea. *R. 7 Co.* 19, 20. *Sir Thomas Cecil.*

But a matter of freehold shall not be determined upon a bill, without a trial at law. *Vide Chancery*, (X—4 V.)

Tho' it concerns the freehold of the king. *R. per two J. Parker cont.* 1656. *Hard.* 51.

So, the plaintiff ought to allege himself debtor and accomptant to the king, in a bill, as well as in an action; otherwise the court has not jurisdiction. *Vide ante*, (D 2.)

So, if the plaintiff sues in his own right, and also as administrator to *B.* he ought to allege himself debtor, and also that *B.* was debtor; otherwise there is no jurisdiction to sue as administrator. *R. Hard.* 60.

[If a bill be preferred for a matter or sum below the dignity of the court, it may be dismissed on motion, or on demurrer. *Per Price B. M.* 1717, *Bunb.* 17.]

[But if there is fraud, or complicated matter, it will be retained. *Ibid.*]

For proceedings in the causes in equity in the *Exchequer*, vide the similar articles in title *Chancery*.

(D 8.) The Officers of the *Exchequer*.

(D 8.) *The lord treasurer.*] The first officer of the *Exchequer* is *dominus thesaurarius Angliæ*. 4 *Inst.* 104. *Vide Officer*, (E 1.)

Who was antiently constituted by the delivery of a golden key; and now, by the delivery of a white staff. 4 *Inst.* 104.

The lord treasurer of *England* has now, by letters patents, granted to him the treasury of the *Exchequer*, which was antiently a distinct office. 4 *Inst.* 105. *Mad.* 568.

By his oath he is bound to serve the king truly in his office, to do right therein to all, truly to keep and dispend the king's treasure, truly to counsel the king, and his counsel keep, not to know nor suffer the king's hurt, or dishonouring if he can let it, if not, to disclose it clearly to the king, and to purchase the king's profit all he reasonably may. 4 *Inst.* 104.

As treasurer of the *Exchequer*, he with the barons has the custody of the records of the *Exchequer*. 4 *Inst.* 105.

He ought to have a warrant for the disposing of all treasure which he disposes of; for having only the custody of the treasure, he cannot dispose of it *ex officio*. *Mo.* 476.

(D 9.) *The chancellor.*] The chancellor of the *Exchequer* has the custody of the seal of the *Exchequer*, 4 *Inst.* 104. 119. *Mad.* 580.

And now has usually the office of under-treasurer of the *Exchequer*. *Mad.* 578.

And is comptroller of the pipe. 4 *Inst.* 106.

And appoints the two appraisers of goods seized for not paying customs, and directs whether the party shall have them at such price, or not. 4 *Inst.* 104.

And, in the vacancy of a treasurer, does every thing in the receipt of the *Exchequer*, which the treasurer may do. 4 *Inst.* 104.

(D 10.) *The barons.*] The chief baron and the other barons of the *Exchequer* are constituted by letters patents. *Mad.* 582. 4 *Inst.* 117.

And were antiently barons and peers of the realm. 4 *Inst.* 103. in *marg.*

The treasurer and barons are the principal officers of the *Exchequer*. *Sav.* 38.

The barons are the sole judges of the court of pleas; tho' the treasurer of the *Exchequer* is joined with them in the custody of the records of the court. 4 *Inst.* 105. 109.

And shall take an oath to do right to all, &c. 4 *Inst.* 109. *Mad.* 586, 7.

They may discharge and respite debts due to the king. *Mad.* 137.

But the court of equity there, is before the treasurer, chancellor and barons. 4 *Inst.* 109.

(D 11.) *The chamberlains.*] The chamberlains of the *Exchequer* have their office usually for life, *exercendum per se aut deputat.* 4 *Inst.* 106.

And appoint two deputies. 4 *Inst.* 107. *Mad.* 732.

Antiently they had the keys of the chests, weighed the money, and laid up the bags of 100*l.* *Co. L.* 106. *a.*

And now they have the keys of the treasury, where the records of leagues, doomsday-book, pleas of justices in eyre, and of the forest, &c are. 4 *Inst.* 106. *Co. L.* 106. *a.* *Compl. Att. in Exch.*

But they cannot use their keys till the auditor of receipt brings the key of the treasurer. *Compl. Att.*

So, the custody of the treasure and record belongs to them jointly with the treasurer. *Mo.* 475.

To them belongs the office of one of the door-keepers of the receipt. 4 *Inst.* 106.

Their under-chamberlains cleave the tallies, and read them when written by the clerk of the tallies, that the clerk of the pells and comptroller of the pells may see their entries be true. 4 *Inst.* 107.

(D 12.) *Remembrancers.*] There are three remembrancers, of the

the king, of the treasurer, of the first-fruits. 4 *Inst.* 106. *Mad.*

714.

The two first are in the king's gift, and have each two secondaries.

5 *Inst.* 106, 107, 108.

By the *stat.* 5 R. 2. 14. the said two remembrancers shall be sworn to see all writs of the great or privy seal, sent to the *Exchequer* for discharge of any person of any demand in the *Exchequer*, put into due execution by those to whom it pertaineth. *Vide* 37 *Ed.* 3. 4.

And shall every term make a schedule of all so discharged, and send it to the clerk of the pipe, &c.

The king's remembrancer, by his office, ought to make process against collectors of the customs, &c. enter in his office all recognizances acknowledged before the barons, take bonds for the king's debts, &c. and make process upon them, make process upon all informations upon penal statutes (which are entered in his office) and bills of composition upon them, enter the stallment of debts, keep all conveyances, &c. of lands, &c. granted to the king; and all proceedings by *English* bill are entered there. 4 *Inst.* 108.

So, he ought to tax all bills of costs in the *Exchequer*. *Rules and Orders in Exchequer*, 16. *Rule*, 42.

The treasurer's remembrancer makes process by *fieri facias*, and extent for the king's debts, &c. enters upon record if accomptants pay their proffers, &c. 4 *Inst.* 108.

But, if a remembrancer be made a baron of the *Exchequer*, his patent shall be void. *Dy.* 197. b.

[The treasurer's remembrancer in appointing the clerks in his office, is restricted to such as have served a clerkship in the same. *Ex parte Deverell*, 2 *Anstr.* 483. 616.]

[In the king's remembrancer's office a clerk must have *bona fide* served a clerkship of five years. *Ex parte Windus*, 2 *Anstr.* 489.]

(D 13.) *Clerk of the pipe.*] The clerk of the pipe is, by his patent, described to be *ingrossator magni rotuli in Scaccario*. 4 *Inst.* 106. *Mad.*

717.

And all accounts and debts to the king are collected out of the offices of the king's and treasurer's remembrancer, and put into a great roll, called *the pipe*, and then they are duly charged. 4 *Inst.* 106.

He has also a roll of reversions, which comprehends grants for years, for life, and in tail, without rent, &c. to the intent that a writ may issue, if need be, to inquire whether the lessee be dead, or the entail determined. *Ibid.*

There are two secondaries of the pipe. 4 *Inst.* 107.

The chancellor of the *Exchequer* is comptroller of the pipe. *Vide ante*, (D 9.)

(D 14.) *The auditors, &c.*] There are five auditors in the *Exchequer*, who take and audit all accounts of receivers, collectors, &c. 4 *Inst.* 106.

The auditor of the receipt, who files and enters the bills of the tellers, certifies to the lord treasurer every week the money received, makes a debenture to each teller before he pays any money, and audits their accounts. 4 *Inst.* 107.

He has also the custody of the black book of receipts, and of the lord treasurer's key : and sees that the tellers lock up their money in the treasury. 4 *Inst.* 107.

There are two auditors of the prest, who audit all accounts of money imprest to any person. 4 *Inst.* 107. And foreign accompts. *Mad.* 729.

But an auditor cannot determine whether a licence or grant be good. 4 *Inst.* 106.

Neither can he put any thing in charge ; for he only audits accounts. *Ibid.*

Neither can he make a *super*, but only money received and audited before. 4 *Inst.* 167.

(D 15.) *Foreign opposer, &c.*] The foreign opposer opposes all sheriff's, &c. in their accounts of the green-wax, viz. of all fines, issues, amerciaments, recognizances, &c. for which process is sent to the sheriff, sealed with green-wax. 4 *Inst.* 107.

The clerk of the estreats provides that summons for all fines, &c. estrated into the *Exchequer* be issued. *Mad.* 731.

The clerk of the *nichils* makes a roll of the sums in process, for which the sheriff returns *nichil*, and delivers it to the treasurer's remembrancer. 4 *Inst.* 107.

The clerk of the summons. *Ibid.*

The clerk of the pleas has the office in which all suits are entred. *Ibid.*

The clerk of the tallies, who makes tallies for debt, or for reward. 4 *Inst.* 107, 8.

The clerk of the pells enters all receipts or bills of the tellers, in *pelle receptorum* ; and all payments in *pelle exituum*. 4 *Inst.* 108. *Mad.* 739.

There are four tellers, who receive all money for the king, give a bill of receipt to the clerk of the pells, who charges them ; pay all money by warrant of the auditor of the receipt, and make a book of receipts and payments for the lord treasurer. 4 *Inst.* 108. *Mad.* 739. *Vide ante*, (D 4.)

The usher of the *Exchequer* is an antient officer, who has under him four under-ushers. *Mad.* 718. *Dy.* 213. b.

The usher of the receipt.

The *pesor* and *fuser* who weigh and melt the coin paid in the receipt of the *Exchequer*. *Mad.* 540, 1.

The marshal has the custody of debtors committed during the term, receives all offices found *virtute officii*, and delivers them to the treasurer's remembrancer, and appoints auditors for the accounts of sheriffs, &c. 4 *Inst.* 107. *Mad.* 725.

Vide 4 *Inst.* 107, 8.

(E) The Court of Chivalry.

(E 1.) Who are the Judges.

THE court of chivalry, or court martial, is held before the lord constable, and earl marshal of England. 4 *Inst.* 123. *Ca. Parl.* 66. *Vide Officer*, (E 2, 3.)

The

The constable was antiently constituted for life, or for him and his heirs; but 13 *H.* 8. it was forfeited by the attainder of the duke of *Bucks.* and was never after granted but *pro hac vice.* 4 *Inst.* 127. *Spel. Gl.* 146.

But the earl marshal cannot hold plea without the constable. *Ca. Parl.* 66.

Not for the marshalling of funerals, arms, &c. *R. cont.* 1 *Sid.* 352. 1 *Lev.* 230. *Acc. Ca. Parl.* 66.

And therefore, where the king refuses to make a constable, the plea cannot be determined in the court of chivalry. *Co. L.* 74. *b.*

(E 2.) What Jurisdiction it has.

By the *st.* 13 *R.* 2. *st.* 1. *c.* 2. it is declared, that this court has cognizance of contracts touching deeds of arms, and of war out of the realm. *Vide Co. L.* 391. *b.* 4 *Inst.* 123.

And of things which touch war within the realm, which cannot be determined by the common law; with other usages and customs to the same matters pertaining.

The plaintiff shall by his petition declare plainly his matter, before any shall be cited to answer thereto.

And therefore, if a man be accused of treason, misprision, &c. done out of the realm, it shall be tried before the constable and marshal. 4 *Inst.* 124.

And tho' by the *st.* 26 *H.* 8. 13. 35 *H.* 8. 2., & 5 *Ed.* 6. 11. treasons and misprisions, &c. may be inquired of in *B. R.* or before special commissioners, if done out of the realm, as well as done in it; yet this does not take away the jurisdiction of the constable and marshal. 4 *Inst.* 124. 2 *Rush.* 107.

So, murder, homicide, &c. out of the realm, shall be tried upon appeal before the constable and marshal. *Co. L.* 74.

So, if the mortal stroke be given out of the realm, tho' the death be within the realm. *Co. L.* 74. *b.*

So, the court has an absolute jurisdiction, by prescription, in matters of honour, pedigree, descent, and coat-armour. 4 *Mod.* 128.

But by the *st.* 13 *R.* 2. *st.* 1. *c.* 2. if a plea be commenced before the constable and marshal of any matter that may be determined by the common law of the land, a privy seal shall be directed to the constable and marshal to surcease, &c.

So, by the *st.* 8 *R.* 2. 5. all pleas that ought to be discussed at common law, shall not be held before the constable and marshal.

And therefore, a prohibition lies, as well as a privy seal, if the court proceeds upon a matter out of their jurisdiction. *R. Ca. Parl.* 63. *Adm.* 4 *Mod.* 128.

As, if the suit be there for the ordering of a funeral. *Ca. Parl.* 64.

For encroachment upon the office of an herald; for an action upon the case lies for it at common law. *Ca. Parl.* 65.

So, the constable and marshal have no jurisdiction of a thing done upon the high sea, though it be out of the realm; for it belongs to the admiral. 4 *Inst.* 124.

So, the marshal has no jurisdiction alone, if no constable be made, at least, *pro hac vice.* 2 *Rush.* 107.

The court of chivalry proceeds according to the usages and customs of the same court. 4 *Inst.* 125.

And if the usage fails, according to the civil law in the case of arms. 4 *Inst.* 125. *Co. L.* 391. b. 2 *Rush.* 107.

The trial in the court of chivalry shall be by combat, or by the testimony of witnesses. *Co. L.* 74. a.

As to trial by combat, *vide Battle.*

By attainder upon a judgment in the court of chivalry lands are not forfeited, nor the blood corrupted. 4 *Inst.* 125.

After sentence in the court of chivalry, the party grieved may appeal to the king. *Ibid.*

(E 3.) What Officers belong to the Court.

The heralds.] The heralds are officers attendant upon the court of chivalry. 4 *Inst.* 125.

There are three kings of arms, *garter, clarencieux, norroy*; and each of them has several heralds under him. *Vide Norroy.*

A king of arms shall be created by the king's patent.

And the title of *garter, &c. king of arms* is parcel of his name.

So, a herald shall be created by patent. 4 *Inst.* 127.

And he shall be a complete officer by his patent, tho' he has no other investiture. *R. Noy*, 150.

And tho' he never was pursuivant, yet by the rules of the office this is required. *Noy*, 150.

The heralds were incorporated by *R. 3.* and afterwards by charter 3 *Ph. & M.* 4 *Inst.* 126.

And by patent 3 *Ed. 6.* they are discharged of all tolls, subsidies, &c. *Ibid.*

It belongs to *garter* king of arms, to marshal all public funerals of the nobility, and to *clarencieux* and *norroy*, the public funerals of the gentry, and to direct what banners and arms shall be used. *R. per three J.* 1 *Sid.* 353. *Vide Ca. Parl.* 63. 4 *Inst.* 126.

(F) The Court of the Marshalsea.

THE court of the *marshalsea* is held before the steward and marshal of the king's household. 4 *Inst.* 130. 10 *Co.* 72. a. 6 *Co.* 12. a.

And it has original jurisdiction within the verge, *viz.* within the circuit of twelve miles round the mansion of the king. 4 *H.* 6. 8. 4 *Inst.* 130. *Ld. Bac. Charge at the sessions of the Verge.* *Vide the st.* 33 *H.* 8. 12.

The jurisdiction was general, by the common law, in all causes, criminal and civil, real, personal, and mixt, within the verge, as justices in *eyre*, or vicegerents of *B. R.* there: but this is now taken away by the *st. Art. sup. Chart.* 3. 10 *Co.* 71. 2 *Inst.* 549.

And now the coroner within the verge may inquire of murder, homicide, &c. done within the verge, with the coroner of the county, by the *st.* 28 *Ed. 1. Art. sup. Chart.* 3.

And his authority is the same with the coroner of the county. *R.* 4 *Co.* 46. *Vide the st.* 33 *H.* 8. 12.

But *B. R.* justices of gaol-delivery, of the peace, &c. have a general jurisdiction, and may inquire of felony, &c. within the verge. *R.* 4 *Co.* 46.

And

And if the coroner of the county be also coroner of the verge, an indictment before him is good. *R. 4 Co. 46. a.*

So, there was also a particular jurisdiction in the marshalsea by the common law, confirmed by the *st. 28 Ed. 1. Art. sup. Chart. 3.* to have cognizance of trespass *vi & armis* within the verge, where the plaintiff or defendant was of the king's household; and of debt, and covenant, when both were within the king's household. *12 Co. 71, &c. 2 Inst. 548. R. 6 Co. 20. b. Conf. by the st. 15 H. 6. 1. D. 1 Sid. 180.*

So, there is the palace-court in the marshalsea, which has jurisdiction within the verge of twelve miles, tho' neither party be of the household. *Sal. 439.*

[Where process has issued to arrest persons residing within the boundaries of the palace-court, it has been usual to obtain permission from the king for that purpose, signified by the officers of his household, and the writs have in such instances been backed by the clerk of the Board of Green-Cloth: but for many years past, civil process has been executed within the said boundaries without such leave. However, an indictment will not lie against an officer of the palace-court for arresting a person not of the king's household, against whom a writ has issued out of that court, though no leave to make the arrest had been obtained from the Board of Green-Cloth. *Rex v. Stobbs, T. 30 Geo. 3. 3 T. R. 735.*]

But the marshalsea cannot hold plea of freehold.

Nor, of trespass upon the case, or other trespass which is not done *vi & armis*. *2 Inst. 548. 10 Co. 76. a.*

Nor, in ejectment.

Nor, in *trover*, *assumpsit*, &c. *10 Co. 76. a. R.* unless both parties are of the household. *2 Rol. 498.*

If the marshalsea holds plea of a thing done out of the verge, the proceedings are void, and *coram non iudice*. *Pl. Com. 37. b.*

So, in trespass, when neither party is in debt and covenant, when both are not of the king's household. *R. 10 Co. 77. a.*

If the plaintiff or defendant be alleged falsely to be of the household, by the *st. 15 H. 6. 1.* it may be averred to the contrary; or the party may have a *superfedas* directed to the steward and marshal. *10 Co. 75. b.*

The marshalsea is a court of record. *10 Co. 69. b.*

The proceedings are by bill, and not by original. *10 Co. 73. a.*

If the king's household removes out of the verge, the actions there depending are discontinued. *10 Co. 73. a.*

Error of a judgment there was in parliament before the *st. 5 Ed. 3. 2.* and *10 Ed. 3. st. 2. 10 Co. 69. b.*

(G) The Court of Green-Cloth.

SO, by the common law, a court is held before the lord steward, treasurer of the household, comptroller, master, cofferer, two clerks comptrollers, who sit at a table with a green cloth *in domo comput. hospitii regis*. *4 Inst. 131.*

And they have jurisdiction to take an account of all the expences of the king's household. *Ibid.*

To make provision for the household, and payment for such provision. *4 Inst.* 131.

For the good government of the servants of the household, who are paid, by the lord chamberlain those above stairs, by the cofferer those below. *Ibid.*

(H) The Court of the Steward of the King's Household.

SO, by the *stat. 3 H. 7. 14.* the steward, treasurer, and comptroller of king's house, or one of them, may inquire by twelve of the cheque-roll of the household, if any servant of the cheque-roll, under a lord, make any confederacies, compassings, &c. with any, to destroy the king, or any lord of the realm, or any other sworn of the king's council, or the steward, treasurer, or comptroller of the household, and if found, he may be put to answer. And they, or two of them, may hear and determine same offence (which shall be felony) by twelve other of the household, against whom no challenge but for malice. And if the defendants be found guilty by confession or otherwise, they shall have judgment as felons attain by the common law.

So, by the *stat. 33 H. 8. 12.* all treasons, misprisions, murders, man-slaughters, bloodsheds, &c. in any palaces or houses of the king, or other house where he resides, shall be inquired, tried, &c. before the lord great master or lord steward, and in his absence, before the treasurer and comptroller, and the steward of the marshalsea, &c. or two of them, whereof the said steward of the marshalsea to be one, without further commission.

And tho' the king be removed from the palace, where the offence was done before the inquest or trial, it shall be inquired of, tried, &c. before the king's said ministers, or two of them, by his servants of the cheque-roll at the palace, &c. where the king is residing.

And all inquisitions by the coroner of the household shall be returned before them.

And they may issue a precept to the clerks comptrollers, clerks of the cheque, and clerks marshal, to return twenty-four of the yeomen officers of the cheque-roll, of whom they may appoint any number more than twelve to inquire of such treasons, misprisions, &c.

So, there is a commission usually granted to officers within the verge to be justices of the peace, and *oyer and terminer*, for riots, and other offences there. *Mod. Ca.* 76.

(I) The Portmote Court.

THE *portmote* is a court held in a port, or haven of the kingdom. *4 Inst.* 148.

The Court of High-Commission

Is taken away by the *stat. 16 Car. 1. 11.*

(K) The Court of Star-Chamber.

AN antient court was holden *coram rege & concilio suo in camera*, which was the court of Star-Chamber. 4 *Inst.* 60. 2 *Rush.* 472.

And therefore, it was not erected by the *st.* 3 *H.* 7. 1. but that act affirmed the jurisdiction of the court, and was directory to its proceedings in several particulars. 4 *Inst.* 62.

The jurisdiction of the court extended to the examination and punishment of oppressions, and other exorbitant crimes of great men, bribery, extortion, maintenance, embracery, forgery, perjury, spreading of false rumours, libels, riots, routs, unlawful assemblies, misdemeanors in sheriffs or bailiffs, frauds, duels, challenges, and other extraordinary offences, pursuant to the laws and customs of the realm. 4 *Inst.* 63.

And the proceeding was by information or bill, examination of parties upon interrogatories and witnesses. *Ibid.*

The informations, bills, answers, replications, and decrees were in *English*, ingrossed in parchment, and filed. *Ibid.*

The process was by *subpœna*, attachment, commission of rebellion, &c. all under the great seal. 4 *Inst.* 66.

But the court had no jurisdiction, except for things which were contrary to the common law, or a statute. 4 *Inst.* 63.

Nor, for an offence which touched the life or member of a man. 4 *Inst.* 66.

Nor, for matters of an ordinary nature, which belonged to the courts of common law. 4 *Inst.* 63.

And now by the *st.* 16 *Car.* 10. this court, and all the jurisdiction exercised therein, are dissolved, and taken away.

The Court of Requests

Is taken away by statute. *Vide the st.* 16 *Car.* 1. 10. *Vide* 4 *Inst.* 97.

The Court of First-Fruits and Tenths

Is taken away by the *stat.* 1 *Mary* 10. 4 *Inst.* 120.

The Court of Augmentations

Is taken away by the *st.* 1 *Mary* 10. 4 *Inst.* 122.

{ (L) The Court of Stannaries.

(L 1.) In what Cases it has Jurisdiction.

BY charters, one to the tinnors of *Cornwall*, and the other to the tinnors of *Devon*, made 10 *Ap.* 33 *Reg. Ed.* 1. and confirmed by charter 8 *Ric.* 2. the king grants *quod omnes stannatores dum operantur, &c. sint quieti de placitis nativorum & omnibus placitis & querelis curiam nostram spectant., &c. ita quod non respondeant coram aliquibus iudiciariis, &c. de aliquo placito infra stannarias prædictas emergent., exceptis placitis*

terre, vite, & membrorum. Pl. Com. 327. b. 4 Inst. 232. Stat. 16 Car. 1. 15. Vide Abatement, (D 7.)—Waife, (H 2.)

Et quod custos noster vel ejus locum tenens teneat omnia placita inter stannatores predictos & inter ipsos & alios de omnibus transgressionibus, querelis & contractibus infra stannarias illas emergent., &c. Pl. Com. 327. b.

By *fl. 50 Ed. 3.* and by his charter 6 July, 50 *Ed. 3.* upon complaint of grievances by colour of the same charters, restraint was put to such grievances, *salvis libertatibus & privilegiis per chart. predict. concessis. 4 Inst. 233.*

And therefore, the warden of the stannaries may hold a court for redress of all trespasses, complaints, and contracts between the tinner working within the stannaries, &c. and between them and others.

And this privilege extends to all blowers, labourers, and workers without fraud in or about the stannaries in *Cornwall* and *Devon*, during the time they work there. *R. by all the J. 4 Jac. 4 Inst. 231.*

So, the court of the stannaries shall have jurisdiction in all matters which concern or depend upon the stannaries. *R. 4 Inst. 231.*

So, in all transitory actions between tinner and tinner, tho' the cause be collateral, and does not relate to the stannaries. *Ibid.*

So, it may be in the stannaries, though the cause arises out of the stannaries, where the defendant lives within the jurisdiction. *Ibid.*

So, between a tinner and a foreigner, if the defendant does not plead to the jurisdiction, and it does not appear upon the proceedings to be out of the jurisdiction. *Ibid.*

(L 2.) In what not.

But by the *fl. 50 Ed. 3.* the court of stannaries has jurisdiction only *de operariis laborantibus in stannariis illis, & non de aliis, aut alibi laborantibus. 4 Inst. 233.*

Tho' he be matter to the labourers within the stannaries, or his other servants. *Semb. 4 Inst. 233.*

So, by the *fl. 16 Car. 1. 15.* in a vill only, where some tin-work is in work, and shall be in working.

So, the court of stannaries has no jurisdiction in any local action, which arises out of the stannaries; for pleas of land, life, or member, are excepted out of the charter, and therefore there must be justice elsewhere. *R. 4 Inst. 231.*

Nor in a personal action, which arises out of the stannaries, if it be between a tinner and another, and the defendant will plead to the jurisdiction, or it appears upon the proceedings to be out of the jurisdiction. *Ibid.*

So, if the cause of action, between a tinner and a tinner, arises out of the stannaries, it may be brought elsewhere if the plaintiff will. *2 Inst. 231.*

If the plaintiff sues in the court of the stannaries, where the matter arises out of the jurisdiction, the defendant may tender a plea to the jurisdiction upon his oath; and if it be refused, he shall have a prohibition. *Ibid.*

And he has privilege, that he shall not be arrested in any place when he goes to make his oath, *eundo, redeundo, aut morando. Ibid.*

So,

So, by the *fl. 16 Car. 1. 15.* the defendant shall be discharged, if he tender an oath, that he is not, nor was a tinner, when the suit commenced, unless the plaintiff make oath, that *he* is a working tinner without fraud, and that his suit arose within the stannaries, or concerns tin, or tin-works.

So, if it appears, by the plaintiffs own shewing, that the cause of action arises out of the jurisdiction; the proceeding there shall be void, though the defendant did not plead to the jurisdiction. *Ibid.*

Or, if it appears by the condition of an obligation, that a thing was to be done out of the jurisdiction. *Ibid.*

And in such case, if execution be executed, trespass or false imprisonment lies. *Semb. 4 Inst. 231.*

So, by the *fl. 16 Car. 1. 15.* an action lies, if any not a tinner, &c. sue there, in which the plaintiff shall recover 10*l.* and his damages and costs.

(L 3.) How the Proceeding shall be.

The court of stannaries is held *coram custode stannariae*, &c. *4 Inst. 229.*

And ought to be guided by special laws, allowed by custom or prescription. *Ibid.*

So, a demurrer there ought to be only for matter of substance, and not for form. *R. 4 Inst. 231.*

So, error does not lie upon a judgment given there. *4 Inst. 229. 1 Rol. 745. l. 20.*

Nor, a writ of false judgment. *R. 4 Inst. 230.*

Neither can it be examined in *B. R.*, *Chancery*, or other court. *R. 7 Eliz. 4 Inst. 230.*

But an appeal lies, by usage, to the steward of the stannaries, and from him to the under-warden, and from him to the warden of the stannaries, and from him to the prince and his council. *R. 4 Inst. 230. 1 Rol. 745. l. 20.*

And, if there be no prince, to the king in council. *1 Rol. 745. l. 20.*

(M) The Courts of the Universities.

BY the *fl. 13 Eliz. 29.* the universities of *Oxford* and *Cambridge* are severally incorporated; and all former letters patent to them verally granted, and all manors, &c. franchises, privileges, &c. are confirmed. *4 Inst. 227. Vide University.*

And therefore, by charter *14 H. 8.* now confirmed by the same *fl. 13 El.* the university of *Oxford* may hold plea, before the vice-chancellor, in all things personal, *secundum legem terra, aut morem universitatis.* *Lit. 10.*

And in trespass by any person, where a scholar is party. *1 Sal. 343.*

Before the *14 H. 8.* the university of *Oxford* had a court-leet. *Ibid.*

But an university, in their court, cannot hold plea for the penalty of a statute; and a recovery there is no bar in an action at common law. *Skin. 665.*

[In the chancellor of *Oxford's* court, the plaintiff, to obtain a warrant to arrest defendant, must swear he has a personal action against him, and that he *believes* he will run away: to swear *of and upon the truth*

of the premises, and that he *suspects* he will run away, is not sufficient. *Smith v. Dr. Bouchier*, M. 8 G. 2. Str. 993. B. R. H. 62.]

[The publication of a pamphlet in the university of Cambridge against the established religion is an offence against the statute *de concionibus*, and punishable with banishment by the vice-chancellor, assisted by the heads of colleges, in the vice-chancellor's court. *Rex v. Cambridge*, M. 35 Geo. 3. 6 T. R. 89.]

(N 1.) The Ecclesiastical Courts.

AS to the original of the ecclesiastical jurisdiction, *vide Prerogative*, (D 9, &c.)

As to the court of convocation, *vide Convocation*.

The court of high commission is now taken away by the *fl.* 16 Car. 1. 11.—*Vide* for this, *Prerogative*, (D 17.)

The courts of the archbishop are, 1. The *Prerogative* court, 2. The court of *Arches*. 3. The court of *Audience*. 3. The court of *Faculties*.

[No proceedings in the ecclesiastical courts of this kingdom are records, but only evidence of sentences in their courts, and the officers should not take upon them to intitle them *recorda dom*. *Colegrave v. Juson*, M. 1744. 3 Atkyns, 197.]

(N 2.) The Prerogative Court.

The prerogative court, is the court where the archbishop grants administration, or makes probate of the testaments of all having *bona notabilia* within his province. 4 Inst. 335. *Vide Administrator*, (B 3, &c.)

Or, repeals a probate, or administration, granted by surprise.

A sentence by an ecclesiastical judge, in a spiritual cause, shall be allowed as consonant to the ecclesiastical law, by the temporal judges. 2 Rol. 219. l. 20. 5 Co. 7. *Caudrey's Case of the King's Ecclesiastical Law*.

And therefore a certificate, &c. of such sentence need not mention the cause of it; as, if it certifies a deprivation of an ecclesiastical person, it need not express the cause of the deprivation. 2 Rol. 219. l. 30.

So, it is sufficient if a sentence be found in a special verdict, without mentioning the cause. *Ibid*.

So, a process in the name, and under the seal of a bishop, &c. shall be good. R. 12 Co. 7. *Vide Prerogative*, (D 17.)

(N 3.) The Arches,

The court of *Arches* has ordinary jurisdiction in *Bow* and twelve other parishes in *London*, for ecclesiastical causes there arising. 4 Inst. 337.

So, it has jurisdiction upon appeal, in all causes within the province of *Canterbury*. *Ibid*.

The dean of the arches is the judge in this court. *Ibid*.

And may hear causes, at the instance of parties, or *ex officio*.

And act as deputy to the archbishop, and by his authority. *Skin.* 290.

But

But a suit ought not to be in the arches, where the archbishop himself is a party; for tho' another sits as judge there, the archbishop may sit there if he pleases. 2 *Sbo.* 146.

Tho' the archbishop sues only as a trustee; for he ought to have a commission of delegates originally. *Ibid.*

So, an appeal does not lie from the dean to the archbishop. *Skin.* 290.

(N 4.) The Audience.

The court of *Audience* is held in the archbishop's palace, before his vicar-general in spirituals.

The jurisdiction does not relate to causes between party and party, but to matters *pro forma*. 4 *Inst.* 337.

As, the consecration and confirmation of bishops elected. *Ibid.*

Admission and institution to benefices. *Ibid.*

Dispensations. *Ibid.*

The grant or appointment of a guardian of the spiritualties *sede vacante*. *Ibid.*

And by himself, or his commissary, he may exercise all ecclesiastical jurisdiction in *qualibet diocesi, sede vacante*; and make institutions and visitations in such diocese, as the bishop himself when the see is full.

(N 5.) The Court of Faculties.

So, the archbishop has a court of Faculties, which does not hold plea in suits, but there the archbishop, or his official, master of the faculties, grants dispensations in cases allowed by the *st.* 25 *H.* 8. 21. viz. for any such matter whereof dispensations, &c. were accustomed to be by authority of the see of *Rome*.

By the *st.* 25 *H.* 8. 21. the archbishop by himself, commissary, or deputy, may grant by instrument under his name and seal, all licences, dispensations, faculties, compositions, delegacies, rescripts, or other writing, for any such cause, whereof such licences, &c. were accustomed to be had at the see of *Rome*, &c.

The archbishop may constitute a clerk to write and register such licences, &c.

And this court has authority to grant such dispensations and faculties, by the master of the faculties. 4 *Inst.* 337.

As a faculty to be a doctor, bachelor of arts, &c. *Semb.* 2 *Mod.* Ca. 364.

And if it be subscribed by a deputy, and not by the chief clerk of the faculties, and afterwards registered and inrolled, it is sufficient. 2 *Mod.* Ca. 364.

And this court may grant a dispensation for marriage, plurality, accepting a benefice where his father was incumbent, &c. 4 *Inst.* 337.

By the *st.* 5 *El.* 5. the archbishop, bishop, &c. are allowed to grant licence to eat flesh in *Lent*, &c. (*Vide* 4 *Inst.* 337.)

(N 6.) The Consistory-Court.

Every bishop has his consistory-court, held before his chancellor or his commissary, for all ecclesiastical causes within his diocese. 4 *Inst.* 338.

The Consistory-court seems to be erected after the time of *H.* 1. but

but upon the ground of a charter by *W. 1.* to the bishop of *Lincoln*,
4 Inst. 259, 260. *Cod. J. Eccl.* 1009. *Seld. of Tithes*, ch. 14. f. 1.

(N 7.) The Manner of Proceeding.

Omnes cause in foro ecclesiastico movent ex officio, vel ad instantiam partis.
Cause ex officio sunt pro crimine commissio, vel suspecto, & sunt ex officio
mero, vel promoto.

Causæ ex mero officio are, where the judge proceeds against the criminal upon request, or accusation, or detection by another.

Ex officio promoto, where another brings the accusation, and prosecutes the cause.

(N 8.) Censures and Appeals.

As to ecclesiastical censures, *vide Prærogative*, (D 12.)

As to appeals, *vide Prærogative*, (D 13, &c.)

(N 9.) The Court of the Archdeacon.

So, by prescription, or composition, the archdeacon has a court, in what place he pleases, for causes ecclesiastical within his archdeaconry. *4 Inst.* 339. *2 Rol.* 150. *37 H. 6.* 28. a. *Vide Ecclesiastical Persons*, (C 5.)

And shall make a register of his court. *2 Vent.* 269.

The courts of law take notice of his jurisdiction. *2 Rol.* 150. *2 Vent.* 269.

Vide more concerning ecclesiastical courts in Dismes, (M 1, &c.)
 —*Prohibition.*

(O) The Courts of London.

(O 1.) The Hustings.

IN *London* there are, the courts of hustings, of the mayor, of the sheriffs, of the chamberlain, of aldermen, of common-council, the wardmote, court of conservancy, and court of conscience,

The court of *Hustings* is the most antient and eminent court within *London*. *4 Inst.* 247. *2 Inst.* 322.

And is held before the mayor and sheriffs, of all pleas, real, mixt, and personal. *4 Inst.* 247.

By custom, the city of *London* shall hold plea of lands within the city, by writ of right patent, or by other writs of the king. *F. N. B.* 6, 7.

And therefore, when the suit is by right patent, he shall not sue in nature of such a writ as he pleases at common law, as he shall do, when he sues a writ of right close in *antient demesne*. *F. N. B.* 7. A.

By charters of *H. 1.* & *H. 3.* the hustings shall be held once a-week. *2 Inst.* 327. (*Vide Priv. Lond.* 4. 10.)

And therefore, the hustings is held in one week for pleas of land, or actions real, and the next for common pleas; for they are distinct. (*Vide Priv. Lond.* 160.)

After delivery of the writ, three summonses go against the tenant, returnable at the next hustings, and an essoin upon each at the next hustings; and if he does not appear after the third summons and
 third

third effoign, process shall be by *grand* or *petit cape* as at the common law. (*Vide Priv. Lond.* 161.)

If the tenant appears, the demandant counts, and proceeds as at common law. (*Vide Priv. Lond.* 161.)

And, by custom, the tenant shall have an effoign after every appearance, and after the view. *Ibid.*

In the hustings for common pleas, the plaintiff shall sue a writ *ex gravi querela*, a writ of dower *unde nihil habet*, a writ of *gavalet*, of waste, of partition, *quid juris clamat*, &c. 2 *Inst.* 299. *Vide Waste*, (B 1, 2.) (*Vide Priv. Lond.* 164, &c.)

So, a writ of error upon a judgment in the sheriff's court. *Vide post.* (O 4.) (*Vide Priv. Lond.* 164. 168.)

But, by the custom of *London*, judgment of outlawry in the hustings in *London* shall be given by the recorder, not by the mayor, tho' he be coroner, or his deputy, as in other counties. 2 *Inst.* 427.

(O 2.) *If there be a foreign vouchee.*] If the defendant in the hustings had vouched in a foreign county by the common law, the plea was put without day, and the record ought to be removed to *C. B.* 2 *Inst.* 324. *Vide Voucher* (H).

But now by the *st. Gloc.* 12. there shall be a summons *ad warrantizandum* returnable in *C. B.* and a writ to the mayor and bailiffs, to surcease until the plea be determined in *C. B.* and then the warrantor shall answer to the chief plea, and if the demandant recovers, the tenant shall have a writ from *C. B.* to the mayor to extend the land, and to return the extent into *C. B.* and afterwards shall have a writ to the sheriff of the county where the vouchee was summoned, to have of the land of the warrantor to the value. 2 *Inst.* 324. *Vide Voucher* (H).

(O 3.) The Mayor's Court.

The *Mayor's Court* is a court of record, held before the mayor and aldermen, for all actions arising within the liberties of *London*; in which the recorder is judge, but the mayor and aldermen may join with him, when they please. (*Vide Priv. Lond.* 186.)

So, in this court, all matters of equity within *London* may be determined upon bill and answer, upon which the recorder also is judge. *Vide post.* (O 5.) (*Vide Priv. Lond.* 256.)

(O 4.) The Sheriff's Courts.

Each sheriff of *London* has a court of record held before him. (*Vide Priv. Lond.* 264.)

And upon a plaint entered there, any serjeant of mace may arrest the defendant upon a precept *ore tenus*, till he finds bail. (*Vide Priv. Lond.* 271, 272. 277.)

Tho' the entry be only in the porter's book, before an entry in court. (*Vide Priv. Lond.* 277.)

And tho' bail be tendered to the sheriff, the serjeant is not bound to discharge him till notice from the sheriff.

If error be of a judgment in the sheriff's court, it shall be before the mayor and sheriffs in the hustings. 4 *Inst.* 248. (*Vide Priv. Lond.* 164. 168.)

(O 5.)

(O 5.) The Court of Equity in *London*.

By the custom of *London*, if a man be impleaded before the sheriffs, upon a suggestion the mayor may bring the parties and record before him, and examine them upon their pleas; and if he finds that the plaintiff is satisfied, order that the plaintiff be barred. 4 *Inst.* 248. (*Vide Priv. Lond.* 275.)

But by the custom, the mayor cannot examine the parties after judgment. 4 *Inst.* 248. *R. Godb.* 127.

(*Vide Priv. Lond.* 256. 275. 398, &c.) *Vide ante*, (O 3.)

(O 6.) The Ward-mote.

The court of *Ward-mote* is held for every ward in the city: for each ward is of the nature of an hundred in a county. 4 *Inst.* 249. (*Vide Priv. Lond.* 355.)

By inquisition of twelve men, the ward-mote inquires of defaults in paving the streets, &c. 4 *Inst.* 249.

(O 7.) Folk-mote.

The court of *Folk-mote* or *Hall-mote* is *conventus in aula publicâ* of each company in the city. 4 *Inst.* 249.

(*Vide Priv. Lond.* 408.)

(O 8.) The Tower-court.

By prescription, a court is held within the *Tower*, for debt, and other personal actions. 4 *Inst.* 251. (*Vide Priv. Lond.* 409.)

So, by charter of *H. 1.* the citizens of *London* may place whom they will of themselves, for keeping the pleas of the crown, and no other shall be justices over the men of *London*.

(O 9.) The Court of Requests.

[By *stat.* 14 *G. 2. c. 10.* all debts under 40*s.* may be recovered in the court of requests thereby established; concerning which various regulations are laid down.]

[Actions for use and occupation cannot be maintained in the court of conscience in *London*. *Woolley v. Cloutman*, *B. R. M.* 20 *Geo. 3. Dougl.* 244.]

[If an action of assumpsit is brought against an inhabitant of *Middlesex*, by an administrator, and the damages found are under 40*s.* the defendant is entitled to have that suggested on the roll, in the same manner as if the plaintiff had sued in his own right. *Wase v. Wyburd*, *B. R. M.* 20 *Geo. 3. Dougl.* 246.]

[An executor cannot be sued in the court of conscience for the county of *Middlesex*. *Ailway v. Burrows*, *B. R. M.* 20 *Geo. 3. Dougl.* 263.]

[An attorney is not subject to the jurisdiction of the county-court of *Middlesex*. *Wiltshire v. Lloyd*, *B. R. E.* 20 *Geo. 3. Dougl.* 381.]

[So, when a defendant living within the jurisdiction of the court of requests of *Westminster* is sued in one of the superior courts for a debt under 40*s.*, he may plead the *st. 23 Geo. 2. c. 27.* in bar. But, if he omit to do so, the court will not after verdict either enter a suggestion

suggestion on the record, that the defendant lived within the jurisdiction, or stay the proceedings. *Taylor v. Blair*, B. R. M. 30 Geo. 3. 3 T. R. 452.]

[The court of requests for the city of London has no jurisdiction in a suit, unless both the plaintiff and defendant be resident within the city. *Brooks v. Moravia*, C. P. M. 34 Geo. 3. 2 H. Bl. 220. *Webb v. Brown*, B. R. H. 34 Geo. 3. 5 T. R. 535.]

[This statute does not extend to cases where the plaintiff recovers less than 40 s. in a special action on the case for the breach of an agreement. *Jonas v. Greening*, B. R. H. 34 Geo. 3. 5 T. R. 529.]

[The Southwark court of requests act, 22 Geo. 2. c. 47. cannot be pleaded to an action brought in a superior court. *Barney v. Tubb*, C. P. M. 35 Geo. 3. 2 H. Bl. 351.]

[The defendant should avail himself of it by entering a suggestion on the record. *Ibid.*]

[As to the time and manner of entering such suggestion. *Ibid.*]

[The court will not refuse leave to enter a suggestion under the stat. 22 Geo. 2. c. 47. on the ground that a court of conscience has no authority to try a question of bankruptcy. *Keay v. Rigg*, C. P. E. 37 Geo. 3. 1 Bos. & Pull. Rep. 11.]

[The jurisdiction of the court of conscience does not extend to contracts made on the high seas; nor will the court allow a suggestion for double costs under the stat. 23 Geo. 2. c. 33. where the original debt being above 40 s. has by a balance of accounts been reduced below that sum. *McCollam v. Carr*, C. P. E. 38 Geo. 3. 1 Bos. & Pull. Rep. 223.]

The Court of Aldermen.

Vide London (D).—Vide 4 Inst. 248. Vide Priv. Lond. 353.

The Court of the Chamberlain, and of the Chamberlain and Orphans.

Vide Guardian, (G 1, &c.)—*London*, (I—N 2.)—*Vide 4 Inst. 248. 250. Vide Priv. Lond. 279, &c. 302, &c.*

The Court of Common-Council.

Vide London (F).—Vide 4 Inst. 249. Vide Priv. Lond. 350, &c.

The Court of Conservancy.

Vide London (B).—Vide 4 Inst. 250. Vide Priv. Lond. 364, &c.

The Court of the Coroner.

Vide Officer, (G 5, &c.)—*Vide 4 Inst. 250. Vide Priv. Lond. 408.*

The Court of Escheator.

Vide Escheat (C).—Vide 4 Inst. 250. Vide Priv. Lond. 408.

The Court of Watermen.

Vide Priv. Lond. 387, &c.

The

The Court of St. Martin's-le-Grand.

Vide Priv. Lond. 409.*Vide Dismes*, (M 6, 7.)

(P) Courts in other Cities, Burroughs, &c.

(P 1.) *Grant tenere Placita.*

SO, by grant, or prescription, every other city, or borough, may have courts for matters within their precincts.

In every case, where power is given to any, to hear and determine, they have judicial authority, and act as judges. 1 *Sal.* 200.

And if authority be given to fine and imprison, it shall be a court of record. *R.* 1 *Sal.* 200. 396.

A grant *tenere placita*, gives jurisdiction, but not exclusive of other courts. *Hard.* 509. If there be no negative words. *Pal.* 456.

And upon such a grant, the grantee may make a judge; but when made, he is the king's justice. 20 *H.* 7. 6. a.

But a court cannot hold plea of freehold, upon a plaint, without writ: tho' a custom for it be alleged. *R.* 2 *Lev.* 98. 123.

So, a court, which does not proceed according to the common law, cannot be established by the king's charter, without an act of parliament, or prescription. 2 *Vent.* 33, 4. *Vide Chancery*, (A 3.)—*Prærogative*, (D 28.)

[The *stat.* 29 *Geo.* 2. c. 37. does not give power to the courts baron of *Sheffield* and *Ecclesfall*, to hold suit against persons residing within the jurisdiction of those courts in causes arising without. *Rex v. Danfer*, *E.* 35 *Geo.* 3. 6 *T. R.* 242.]

(P 2.) Conuſance of Pleas.

So, the king may grant conuſance of pleas; by which the grantee shall have conuſance of all pleas commenced in other courts out of such precinct. *Hard.* 509. *Pal.* 456. *Vide University.*

And a grant of conuſance of all *actions*, is the same as of all *pleas*. 1 *Rol.* 489. l. 52.

So, the grant shall be allowed, tho' the action be laid in *London*, or in another county: for it shall be commenced *de novo*. *R.* *Hard.* 509.

Tho' the suit be by *quo minus*; for this does not exclude conuſance, where there are the words, *licet tangat nos*. *R.* *Hard.* 509.

So, an antient grant *de curia regali*, or *omni regiâ potestate*, is sufficient, if conuſance upon it has been allowed. 1 *Rol.* 491. l. 10.

So, such antient grant is sufficient, tho' no judge be named, where the bailiff of the grantee has always used conuſance. 1 *Rol.* 491. l. 10. 15. 27.

A grant of conuſance of all pleas extends to an assise, &c. if conuſance of it has been used upon an antient grant. 1 *Rol.* 490. l. 20. 23. 14 *H.* 6. 12. a.

A grant of conuſance *in quibuscunque curiis*, extends to *B. R.* and *C. B.*

C. B. 1 *Rol.* 490. l. 2. *Semb. Pal.* 456.—So, to the *Chancery*, and *Exchequer.* *R. Hard.* 509.

A grant where a scholar or *persona privilegiata* is sued, extends where the college or corporation is sued. *R. 1 Mod.* 164.

And shall be allowed in the *Exchequer*, or *B. R.* though the suit there be by bill, which imports privilege. *R. 6 H. 7. 9. b.*

(P 3.) *When it shall not be allowed.*] But consuance cannot be claimed by prescription. *Co. L.* 114. 1 *Sal.* 183.

And a grant of it will be bad, generally, if it be not said before what judge. 1 *Rol.* 491. l. 5. 20.

Unless where it is implied, before whom; as, if a grant be of consuance within his court; for the judge of the court shall have it. 1 *Rol.* 419. l. 17.

[So, a grant of consuance to proceed in any other manner but by the common law is not good, but by an act of parliament. *Hard.* 509. 2 *Wilf.* 408.]

So, a grant before the bailiff, steward, &c. of the grantee is void, where he has no such officer. 1 *Rol.* 491. l. 25. 1 *H.* 4. 5. a.

So, a grant of consuance in all pleas, does not extend to felony or appeal. 1 *Rol.* 489. l. 55.

Nor, to an assise, unless it be named; for it is a plaint. 1 *Rol.* 490. l. 15. 20. 14 *H.* 6. 12. a.

So, a grant of consuance in covenant does not extend to a fine upon a writ of covenant. 1 *Rol.* 490. l. 50.

So, consuance of pleas *coram quibuscunque justiciariis* does not extend to the justices of *B. R.* or *C. B.* if they be not named. 1 *Rol.* 490. l. 5.

So, consuance of pleas shall not be allowed, where the inferior court cannot do right; as, in *replevin*; for it cannot grant a resumption, or second deliverance. 2 *Inst.* 140. 1 *Rol.* 489. l. 30. *F. g.* 153. 295.

Or, a *quare impedit*: for the inferior court cannot write to the bishop. *Co. L.* 134. b.

Nor, where an interpleader is necessary: for it cannot allow it. 1 *Rol.* 493. l. 20.

Nor, in a fine, or *scire facias* upon it. 1 *Rol.* 490. l. 13. 492. l. 40.

Nor, in an action founded upon a statute made since the consuance granted. 1 *Rol.* 490. l. 30.

Nor, in an attain; for by the *st.* 23 *H.* 8. 3. it shall be brought in *B. R.* or *C. B.* *Co. L.* 294. b. *Dy.* 202. b.

So, it shall not be allowed, if the grantee be party. 1 *Rol.* 491. *H.* 492. l. 15. *Semb. cont. Dy.* 157. a.

Tho' the grant be, *licet ipse sit pars.* 1 *Rol.* 492. l. 20. 30.

Otherwise, where the plea is held before the steward of the grantee. 1 *Rol.* 492. l. 5. 25. *Dy.* 157. a.

So, it shall not be allowed in a transitory action alleged out of the jurisdiction. *R. 1 Sid.* 103.

Or, where the defendant is a foreigner; or where one of the defendants is so, if he cannot be seivered. 1 *Rol.* 493. l. 50. 494. l. 2. 5.

Or, pleads privilege; as, an attorney, &c. *R. 1 Rol.* 489. *C. Dy.* 287. a. in marg. *R. Lit.* 304.

[*Quere.*

[*Quere.* When an attorney is plaintiff, whether the universities are entitled to consuſance? *Willes v. Trabern, C. P. M. 14 Geo. 2. Willes, 233. Barnes, 346. Pr. Reg. 696. S. C.*]

Or, is *in custodia mar.* *Semb. 6 H. 7. 9. b.*

If he be sued as a trustee, or for other matter of equity in *Chancery*, or the *Exchequer*. *R. Hard. 189. R. 2 Vent. 362. Vide Chancery (3 X).*

[*When and how demanded.*] Consuſance ought to be demanded by the lord, and not pleaded to the jurisdiction. *Semb. 1 Lev. 89. Bro. Jurisdiction, 92.*

And it shall be demanded the first day, at the return of the original, where the place appears by the writ; as, in trespass *quare clausum fregit*, &c. *1 Rol. 494. M.*

In debt, &c. if the franchise be a county by itself. *1 Rol. 495. l. 10. R. 3 H. 6. 30. b.*

If the place does not appear by the writ, as generally in debt, *detinue*, &c. it ought to be at the day of the count. *3 H. 6. 31. a. 1 Rol. 494. l. 55. 495. l. 5. R. 9 H. 7. 10. b. 16 H. 7. 16.*

[But a demand comes too late after plea pleaded, and replication tending issue. *Barnes, 346.*]

So, after an imparlance, or an inquest awarded by default. *1 Rol. 489. A. 492. l. 50. 493. l. 10. 494. l. 45. 495. l. 17. 6 H. 7. 10. a. R. 1 Sid. 103. 1 Lev. 89. Sho. 352. [Willes v. Trabern, C. P. M. 14 Geo. 2. Willes, 233. Barnes, 346. Pr. Reg. 696. S. C.]*

[And if the declaration be delivered after *Hilary* term, intituled as of *Hilary* term, it may be claimed the first day of *Easter*, notwithstanding the imparlance: for an imparlance is but a fiction, and one fiction may be set against another by entering the claim on a roll of *Hilary* term. *2 Wilf. 411.*]

It ought to be demanded by the lord himself, or his attorney. *1 Sal. 183. 6 H. 7. 10. a.*

So, by the chancellor of the university, the steward of *Ely*, &c. *Dy. 157. a. 1 Mod. 163.*

By the vice-chancellor, or his attorney. *R. Hard. 510.*

And he ought to shew the charter itself, or an allowance in *eyre*. *3 H. 6. 30. b. 1 Sid. 103. 1 Lev. 89. 1 Sal. 183. Pal. 456.*

And if it be an attorney, his letter of attorney in *Latin*. *2 Sid. 103. Sho. 352. 1 Sal. 183.*

And he ought to continue his demand at every return of process. *1 Rol. 495. l. 31.*

And, it is sufficient to shew usage in a single instance. *1 Sal. 183.*

[The claim must be entered on record, and state every thing that is necessary to take away the jurisdiction of the court. *2 Wilf. 410.*]

[The whole proceedings in the cause up to the time of making the claim, ought to be entered on the same roll with the claim. Then the claim thus; and hereupon comes George Henry, earl of Litchfield, chancellor of the university of Oxford, by C. D. his attorney, to demand, claim, prosecute, and defend his liberties thereof, that is to say, to have the consuſance of the plea aforesaid. *2 Wilf. 410.*]

[Then the charter on which the claim is founded must be fully set forth, and also the act of parliament, if there be a private one, confirming the charter.] [Then,

[Then, if the claim is only by charter, that it has been allowed before by the king's writ, or by the superior courts. 2 *Wils.* 410. 412.]

[But, if it be by act of parliament, it is not necessary to shew that it has been allowed. 2 *Wils.* 412.]

[Then the conclusion in this form: and the aforesaid chancellor demands his liberties and privileges aforesaid, according to the form and effect of the letters patent aforesaid, and the confirmation, aforesaid, in this plea between the parties aforesaid, in the court of the lord the king now depending, to be allowed him. 2 *Wils.* 410.]

[If the claim be by charter only, then add; *as heretofore hath been allowed. Id. ibid.*]

[If the claim be by an university, there must be a certificate from the chancellor that the parties are or at least that the defendant is of the university. *Str.* 810.]

[And that the defendant is actually resident at the university. 2 *Wils.* 312.]

[And there must be an affidavit confirming the chancellor's certificate. *Str.* 810. 2 *Wils.* 312. *Vide B. R. H.* 241.]

Or, at the return of the *capias* or exigent, where the place appears by the writ. 1 *Rol.* 492. l. 45. 495. l. 12.

Yet, it cannot be allowed, till the writ served, and all the defendants appear. 1 *Rol.* 495. l. 27. 40 ad 45.

[If the claim be allowed, that does not so absolutely dismiss the cause, as that it can never be brought back again; but the parties have a day given them in the court of the party claiming conuance, and if the inferior court do not do them *full and speedy* justice, they shall return again to the king's court. 2 *Wils.* 411.]

[Therefore, after the entry of the allowance of the claim the further entry on the roll runs thus: *et super hoc, idem attornatus ejusdem, &c. hic in curia prefixit diem partibus predictis coram, &c. apud T. infra hundredum predictum die, &c. et dictum est eidem attornato, &c. quod partibus predictis plena et celeris justitia inde exhibeatur, alioquin redeant, &c. Id. ibid.*]

[And for good cause shewn, the cause may be brought back again, a re-summons awarded, and the parties go on from the period in which the clause was at the allowance of the claim. *Id. ibid.*]

(P 4.) Incidents to Courts.

If the king grants to a borough, &c. power *tenere placita*, it shall have all incidents, tho' not mentioned in the charter: as, it shall have officers, a serjeant, bailiff, &c. to return juries, execute process, &c. *R.* 1 *Rol.* 526. l. 30.

So, if it be erected by act of parliament: and shall have power to continue their process, as incident. *R.* 1 *Sal.* 408.

So, it shall have process. *Vide post.* (P 8.)

But it shall not have power, as incident, to award a writ of inquiry to a bailiff: for it may be executed in court. *R.* 1 *Rol.* 526. l. 35.

(P 5.) Jurisdiction.

(P 5.) *In actions real.*] The jurisdiction of inferior courts in a
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city, borough, &c. extends to all actions, real or personal, which by grant or prescription are allowed to them.

A writ of *right patent* lies for a tenant in fee, directed to the mayor and sheriffs in London, or to bailiffs, &c. commanding them to do right to the demandant against the tenant for such tenements. *Reg. 2. b. F. N. B. b. C. D. Vide Droit, (B 1, &c.)*

And in this he does not make protestation to sue in the nature of such a writ as he pleases, as in a writ of right close, but must sue such writ as his case requires. *F. N. B. 7. A.*

And therefore, as *right patent* lies for tenant in fee, so a special writ lies to the mayor and sheriffs, or to bailiffs, &c. to do justice to the heir in tail, for lands devised, &c. to him. *Reg. 244. b. F. N. B. 7. A.*

Or, to him in reversion, or in remainder. *Reg. 245. a.*

So, to tenant in dower. *Reg. 170. b. F. N. B. 7. A.*

So, since the *st. Gloc. 6 Ed. 1. 11.* if any one impleaded lose by collusion, to make a termor lose his term. *Reg. 179. a. 2 Inst. 323.*

So, upon the *st. Glo. 13.* if a tenant does waste or estrepement. *2 Inst. 328. Reg. 77. b.*

So, to make partition. *Reg. 76. B. F. N. B. 6. G.*

[If a sheriff is empowered by private act of parliament to take inquisition of the value of lands giving notice to the owners, the notice must appear on the inquisition, otherwise the jurisdiction does not appear; and on *certiorari* all will be quashed. *R. v. Mayor of Liverpool, T. 8 G. 3. 4 B. M. 2244.*]

(P 6.) *Actions personal.*] So, in personal actions an inferior court may hold plea by charter, or prescription.

The style of the court.] And the style of the court ought to shew by what authority the court was held. *R. 8 Co. 133. a. R. 1 Cro. 489. Mo. 422. Ow. 50. 1 Rol. 795. l. 38. Noy, 35. R. 2 Cro. 184. 493. 532. R. Yel. 46. R. 1 Sid 311. R. Jon. 451.*

So, every officer who justifies under the authority of the court, ought to shew it; as, a steward, bailiff, &c. *R. Cro. Car. 46. Adm. Mod. Ca. 72.*

[If the style of the court is, according to the custom whereof, &c. it is not necessary to shew that the steward may appoint an under-steward, or that he was appointed in writing. *Blenkinson v. Isles, M. 2 G. 2. Ld. Raym. 1543.*]

But where the style of the court is not conformable to the usual courts, it shall be aided by intendment, as if, in the style of a court *pedis pulverisati*, it be alleged, that it is held by prescription; it shall not be intended of a court of piepowder, which cannot be by prescription, but of another customary court under that denomination. *1 Sal. 265.*

So, if the style alleges the court to be *secundum legem mercatoriam*, where it does not appear to be *curia stapula*; it shall be intended of some other court under that denomination. *R. 1 Sal. 265. Mod. Ca. 61.*

(P 7.) The Complaint.

In these courts, the complaint is in the nature of an original in C. B. *1 Sal. 266. [Savage v. Knight, 1 Leo. 184. 302. Ward v. Honeywood, B. R. H. 19 Geo. 3. Doug. 61.]*

[If the plaint is, of a *plea of trespass*, generally; it is good, without adding, *with force and arms*. *Blenkinson v. Isles*, M. 2 G. 2. Ld. Raym. 1543.]

(P 8.) The Process.

If the king grants conuſance of pleas, the grantee ſhall have power to make proceſs by *petit cape*, proceſs upon *voucher*, or other proceſs, as incident; tho' no mention of it in the grant. 1 Rol. 490. l. 45.

And he ſhall make proceſs by *capias*, where other juſtices make it. 1 Rol. 495. l. 50.

And, by grand diſtreſs, where the caſe requires. 1 Rol. 495. l. 51.

And if the defendant be convicted, he ſhall be fined, impriſoned, or amerced, as the caſe requires. 1 Rol. 495. l. 55.

So, by cuſtom, goods taken upon grand diſtreſs, if it be returned *quod nihil habet ulterius*, may be delivered to the plaintiff for his debt, if he recovers, upon ſecurity to re-deliver them if he does not obtain judgment. 1 Rol. 564. l. 4.

But a *capias* ought to be after a ſummons or attachment, not the firſt proceſs. *Yel.* 158. R. 2 Cro. 261. [*Moravia v. Sloper*, C. P. M. 11 Geo. 2. *Willes*, 30.]

And if it be, it ſhall be error, and not aided, as the want of an original by the ſt. 18 El. R. 2 Cro. 222. 261. *Yel.* 158.

[But the irregularity of a *capias* iſſuing for the firſt proceſs is aided by defendant's appearance. *Blenkinson v. Isles*, M. 2 G. 2. Ld. Raym. 1543.]

So, a cuſtom, that a *capias* be awarded before ſummons, will be void. R. 1 Rol. 563. l. 20.

So, a cuſtom, in the *capias* againſt the principal, to have a clause, if he be not found to take the bail. R. 1 Rol. 563. l. 44.

So, a cuſtom to take the bail in execution upon a return of *non eſt inventus*, upon a *capias* againſt the principal, without a *ſcire facias*, is void. R. 1 Rol. 563. l. 35. 45.

So, generally, the proceſs ought to be returnable at a day certain; for *ad proximam curiam* is not ſufficient. R. 2 Cro. 314. 2 Bul. 36.

[But where there is a juſtification under proceſs of an inferior court, it is ſufficient that it was returnable *ad proximam curiam*, eſpecially if it appear that the court was held at any time certain, as from three weeks to three weeks. *Cowp.* 21, 22.]

[And this whether the proceſs be meſne or judicial. *Id. ibid.*]

[By ſtat. 19 Geo. 3. c. 70. ſ. 1. no perſon ſhall be held to ſpecial bail, upon any proceſs iſſuing out of any inferior court, for leſs than 10 l.]

(P 9.) The Declaration.

By the ſt. 36 Ed. 3. 15. all pleas in the courts of the king, or others, ſhall be in *Latin*. *Vide the ſt.* 4 G. 2. 26. & 5 G. 2. 27. that all proceedings in courts of juſtice are to be in *Engliſh*.

And therefore, in a declaration, if the day or year be in *Engliſh* figures, it is error. R. 1 Sid. 40. 2 Lev. 102.

Otherwise, in numeral letters, which are *Latin* figures. R. 2 Lev. 102.

Or, if the time be well deſcribed by the year of the king, the addition of the *A. D.* in figures ſhall be rejected. R. 1 Sal. 195.

So, an usage to write in *English*, does not aid. *R. Cro. El.* 85. 185.

By the *st.* 8 *El.* 2. in courts of *London* or corporations, where continuances are *de die in diem*, the plaintiff shall declare in three days after appearance, otherwise at the next court, unless time given by special order of court, or pay costs.

A declaration *unde idem* 2. *per att.* *suum quod cum*, &c. omitting *dicat*, is error. *R. Fel.* 103.

So, if the cause of action does not appear to be within the jurisdiction of the court, it is error; as, if the whole consideration in *assumpsit* does not appear to have been there: as, *assumpsit* for wares sold, without saying *ibidem vendit*. 1 *Sand.* 74. *R.* 1 *Vent.* 243. 1 *Sid.* 87. 1 *Lev.* 137. *R.* 2 *Jon.* 230. 2 *Lev.* 87.

[That the defendant was indebted, and promised to pay within the jurisdiction, is not sufficient. 2 *Wilf.* 16. 1 *Term Rep.* 151.]

[It must also be shewn that the goods were sold and delivered there. 2 *Wilf.* 26.]

[Or, that the money was had and received. 1 *Term Rep.* 151.]

For money lent, without saying, *ibidem mutuat*. 1 *Vent.* 72.

For nursing, without saying, *ibidem nutrit*. *Ray.* 75. 1 *Lev.* 96.

So, if the action be for a close called *B.*, without saying that the close lies within the jurisdiction.

Or, for trespass done there. *Noy*, 129.

[And where one count is not laid within the jurisdiction, and the damages are given generally, it is fatal on a writ of error, though there be another good count. 1 *Term Rep.* 151.]

[And the *stat. of jeofails* will not help it. *Id. ibid.*]

So, if an *assumpsit* be for fees as a solicitor in *Chancery*; for the *Chancery* is not within the jurisdiction. *R.* 1 *Vent.* 28.

Or, *quod non molestaret* the Jesuits, without saying, that the Jesuits lived within the jurisdiction. *R.* 1 *Sid.* 105.

Quod sursum redderet an obligation, without saying, that it was within the jurisdiction. 1 *Sid.* 105.

Quod iret de York ad A., or carry goods from *York* to *A.*, without saying that *A.* is within the jurisdiction. *R.* 1 *Rol.* 545. *l.* 35. 45. *Cro. Car.* 571.

That he would procure a lease of a house in *A.*, without saying that *A.* is within the jurisdiction. *R.* 1 *Lev.* 50. 1 *Vent.* 2.

That he would pay when he returned to *A.*, without such allegation. *R. Cro. Car.* 571. *Jon.* 451.

So, if one sues an heir upon an obligation by his ancestor, without saying, that he has assets there; tho' he says that the obligation was made within the jurisdiction. *R.* 1 *Rol.* 494. *l.* 35.

If one sues for slander within the jurisdiction by which he has lost her marriage, &c. without saying that the loss (which is the gist of the action) was there. *R.* 1 *Sid.* 85. 95. *Ray.* 63. 1 *Lev.* 69. 153.

But if an action be, that he sued *infra jurisdictionem* in the name of *A.* without his consent, *ratione cujus* others sued him: it need not be said, that the other suits were *infra jurisdictionem*; for the suit in the name of *A.*, without consent, is the sole ground of the action. *R. Jon.* 448.

So, if an action be for slander, *per quod* he lost customers *infra jurisdictionem*. *Et alibi*. *R. Jon.* 450. *Mod. Ca.* 224.

In an action upon the case for abusing a horse committed to his care, by riding, it need not be said that he rode *infra jurisdictionem*; for the gist of the action is the neglect. *B. Mod. Ca. 224.*

If in *assumpsit* the plaintiff says, that upon an account for debts *infra jurisdictionem* the defendant was indebted to him in so much, viz. for value received, without saying *infra jurisdictionem*. *F. g. 44. 2 Mod. Ca. 77.*

[If the account is laid to be stated *infra jurisdictionem*, it is not necessary to aver the *items* to have arisen there. *Emery v. Bartlett, H. 2 G. 2. Str. 827. Ld. Raym. 1555.*]

(P 10.) Plea.

By custom, the defendant in debt, without denying the debt, may pray, *quod inquiratur de vero dubito secundum consuetudinem*, upon which the plaintiff shall have judgment for the debt found. *R. 1 Rol. 564. l. 25.*

(P 11.) Continuance.

After appearance until judgment, a continuance ought to be entered from one court to another. *1 Rol. 486. l. 10. 30. 45. Vide Pleader, (V 1, &c. W 1, &c.)*

And therefore *dies datus* to the plaintiff, without a day also to the defendant, is error. *R. 1 Rol. 486. l. 30.*

And the court shall have a power to make continuances as incident. *R. 1 Sal. 408. Vide ante, (P 4.)*

But a continuance by *dies datus* is sufficient, tho' it is not said *dat. per cur.* *R. 1 Sal. 265.*

So, a continuance from one court to another; tho' the charter allows a court from week to week, and it is adjourned to the second week, leaving a week between, except where the charter says, *non aliter*. *R. 1 Rol. 526. l. 50.*

Vide Amendment (I).

(P 12.) Inquest.

The trial in an inferior court shall be by an inquest of twelve lawful men.

And the entry may be *quod venire fac. 12, &c. per quos, &c.* without entering it at large. *Ray. 20.*

So, the *venire* may be for twenty-four or twenty-three in an inferior court, if the trial be by twelve of them.

[By *st. 29 G. 2. c. 19.* judges of courts of record in cities, towns corporate, liberties and franchises, may fine juror not attending, from 20 s. to 40 s.]

But a trial by six only is not good; for a custom for it shall be void. *R. 1 Rol. 564. l. 12.*

So, it cannot grant a *tales*; for an inferior court is not within the *st. 35. H. 8. 6.* and a custom for it is void. *R. 1 Rol. 563 l. 50.*

But there may be a *tales de circumstantibus* by prescription; and if there be added *secundum formam statuti*, it shall be rejected. *R. F. g. 274.*

[It is not a good custom for an inferior court to award a *tales de circumstantibus*. *Ball v Knight, M. 6 G. 2. Str. 941.*]

If the jury do not agree, an inferior court may keep them without eating,

eating, drinking, or fire; and adjourn the court *toties quoties* till they are agreed. 1 Sal. 201.

A *venire fac. coram majore*, without saying *hic*, or *in cur.*, is error. Per Twisd. 1 Sid. 77.

So, a *ven. fac. xii per quos rei veritas scire poterit*, for *sciri*. R. 2 Lev. 83.

So, it is error, if the jury find the defendant guilty, without saying, *super sacramentum suum*. R. Hob. 248.

If they find that the plaintiff has 40s. damage by the non-performance of the defendant's promise; for they ought to say directly *quod assumpsit*. R. Yel. 77.

If the entry be *quod juratores electi, triati, & jurati dicunt* without saying, *ad veritatem dicend.* R. 2 Lev. 83.

Vide Amendment (P).

(P 13.) Judgment.

So, the judgment in an inferior court ought strictly to pursue the legal form; and therefore if it be *ideo consideratum est*, without saying *per curiam*, it will be error. R. 1 Sand. 74. 1 Sid. 143. 147.

So, *ideo videtur curia*. R. Yel. 130. Noy, 129.

Ideo liquet, or, *concessum est*. Yel. 130.

Ideo consideratum est per curiam, without saying, *quia videtur curia quod placitum est minus sufficiens*. R. 1 Sal. 402.

So, if it be, *quod querens nil capiat per narrationem*, where it ought to be *per querelam*. R. Show. 400.

[If judgment is that plaintiff ought to recover, it is bad, and shall be reversed on writ of false judgment: it ought to be, that *he do recover*. *Waldock v. Cooper*, T. 27 & 28 G. 2. 2 Wils. 16.]

So, if *pleg. in misericordia* be omitted in a judgment in *replevin*. Sho. 400.

But in a county palatine, *ideo consideratum est*, without saying *per curiam*, is sufficient. R. 1 Sand. 74.

So, in an inferior court a judgment *quod recuperet pro damnis*, &c. is good, without saying *pro misis & custagiis*; for *damna* includes them. 2 Cro. 420.

So, *quod recuperet pro misis & custagiis de incremento*, without saying *circa sectam suam*. Ray. 20.

[By the *stat. 19 Geo. 3. c. 70. s. 4.* in all cases where final judgment shall be obtained in an inferior court, and an affidavit made thereof in any court of record at *Westminster*, and of execution having issued against the person or effects of the defendant, and that the same cannot be found within the jurisdiction of the inferior court, the record of such judgment may be removed into the superior court, and writs of execution issued to the sheriff of any county, &c.]

Vide Amendment (R).

(P 14.) Writ of Inquiry.

After a judgment by default, &c. a writ of inquiry shall be executed.

And it shall be executed in court, unless where the charter allows it to be before the bailiff, &c. R. 1 Rol. 526. l. 35.

And where the charter allows it before the bailiff, serjeant, &c. it shall not be before the mayor, who is the judge of the court. R. Yel. 69.

(P 15.) The Remedy, if out of the Jurisdiction.

By the *ſ. W. 1. 3 Ed. 1. 35.* of great men and others, who attach, &c. others to answer before them of trespasses, contracts, &c. done out of their jurisdiction, it is provided, that they answer to the person attached damages double, &c.

And therefore, if any sue in an inferior court for a matter arising out of the jurisdiction, an action lies for double damages upon that statute. *2 Inſt. 230.*

So, a prohibition goes to stay such suit. *F. N. B. 45. F. 2 Inſt. 230. Vide Prohibition, (A 1, 2.)*

And such prohibition goes before the action commenced. *2 Inſt. 230.*

Or, after declaration, before plea in bar or imparlance, the defendant may tender a plea to the jurisdiction, upon *affidavit* of the fact; and if it be refused, he shall have a prohibition. *R. 2 Sid. 464. 1 Vent. 88. 181. R. Ray. 189.*

So, where an imparlance is given with the declaration of course, he may, within two days after the declaration. *R. 1 Vent. 333. Per Powel, Lut. 1571.*

So, upon an *affidavit* of the fact, he may have a prohibition without pleading to the jurisdiction. *Per two J., one cont. Lut. 1026.*

Or, if a plea to the jurisdiction be prevented by artifice. *2 Mod. 273.*

So, if a plea to the jurisdiction be refused, he may have a bill of exceptions, and tender it to be sealed; and thereby take advantage of that matter upon error. *Semb. F. N. B. 21. N. D. 1 Vent. 181.*

And a prohibition lies, after a plea to the jurisdiction refused, tho' the matter be alleged to be within the jurisdiction. *R. 2 Rol. 317. l. 30.*

In transitory as well as real actions.

Where the defendant is attached by his goods, or by his body. *F. N. B. 45. F.*

So, if the declaration does not allege the matter to be within the jurisdiction, a prohibition lies at any time. *2 Mod. 273.*

Or, it may be redressed by error. *R. 2 Cro. 96. [or false judgment. Cowp. 20.]*

So, if it appears to be out of the jurisdiction, the judgment is void, and *coram non judice.* *R. 1 Rol. 545. l. 30.*

And if the man or his goods are taken upon it, trespass lies,

Or, if he escapes, no action lies against the officer for the escape. *R. 1 Rol. 545. l. 30. 809. l. 50.*

So, such judgment cannot be pleaded in bar to another action for the same cause. *R. 3 Lev. 234.*

So, where a man sues in an inferior jurisdiction for a matter which he knows to be out of the jurisdiction, an action on the case lies against him. *Semb. cont. Lut. 1569. R. 1 Vent. 369. (Acc. 2 Wilf. 302.)*

[And an action of false imprisonment lies against the judge of an inferior court, where the plaintiff is arrested on process from it, if the judge know that the matter was out of his jurisdiction. *Str. 993. B. R. H. 68. 2 Wilf. 385.]*

Or, if the judge refuses a plea there, which he ought to receive, *Per Jones, 2 Rol. 498.*

But where the matter is supposed within the jurisdiction, and the defendant does not plead to the jurisdiction, but imparts, or pleads another matter, by which he admits the jurisdiction; he shall never afterwards have a prohibition, though it be out of the jurisdiction. *Adm. 1 Vent. 88. 181. R. 2 Mod. 273. 1 Mod. 63. 81. 1 Sal. 202.*

Nor, an action upon the statute for double damages. *2 Inst. 230.*

Nor, relief by error. *1 Vent. 236. Vide 1 Vent. 369.*

So, an officer shall be excused tho' it does not appear by the process to be within the jurisdiction, and in fact it be out of it; for it is sufficient that it be alleged in the plaint or declaration. *R. 2 Mod. 59. 195.*

[In justification, by the officer, it is sufficient to state that the plaintiff below levied his plaint in a plea of trespass on the case, for a cause of action arising within the jurisdiction of the court, without setting forth the cause of action, or that the defendant became indebted within the jurisdiction. *Cowp. 18.*]

So, an action lies against the officer for an escape. *R. 1 Sal. 202. R. P. 7 Ann. inter Higginson and Sheaf. (Com. 153.) R. cont. per three J. Ellis acc. 2 Mod. 30.*

Tho' the officer had notice that it arose out of the jurisdiction. *Vide Com. 153. 156.*

So, an action on the case does not lie against an officer, who is not constable. *R. Lut. 1568.*

Nor, against the plaintiff in the inferior court. *R. Lut. 1560. 1569. 1572. Carth. 190.*

Tho' he knew that the cause of action arose out of the jurisdiction. *Semb. Lut. 1569. Vide supra, (contra).*

[Where the party (the plaintiff below) pleads a justification under process of an inferior court, he must shew that the cause of action arose within the jurisdiction of that court; but the officers of the court need not. *Moravia v. Sloper, C. P. M. 11 Geo. 2. Com. 574. Willes, 30. S. C. Infra, tit. Pleader, (3 M 24.)*]

So, if a prohibition, upon a suggestion that it arises out of the jurisdiction, goes to a suit in an inferior court, a *procedendo* shall be granted, if it appears to be within the jurisdiction; as, if a prohibition be to the courts of London, for slander of the plaintiff in saying that she is a whore, a *procedendo* shall be granted, upon affidavit that the speaking was in London, where such words are actionable, without a return of the custom upon an *habeas corpus*. *Sho. 131. 4 Mod. 367.*

(P 16.) Misdemeanor in the Judge or Officers.

So, for a misdemeanor in the steward or judge of an inferior court, an attachment lies against him, as for a contempt: as, if he gives judgment where he himself is party. *1 Sal. 201. 396.*

If he grants a new trial after judgment and costs taxed. *1 Sal. 201.*

If he grants an attachment against all the goods of the party. *Ibid.*

If he refuses a return and execution of a writ of error; tho' his fees are not paid or tendred. *Lane, 16.*

But a man, who acts as a judge, can never be questioned by action
or

or indictment, for a matter within his jurisdiction, tho' he be mistaken. *R. 1 Sal. 396, 7. Vide Action upon the Case for a Conspiracy (B).*

[But this extends only to the judges of the king's courts of record. *Miller v. Seare, C.P. E. 17 Geo. 3. 2 Bl. 1141.*]

So, an attachment does not go, where the contempt is not manifest: as, if a judgment be against *B.* and satisfied, and afterwards another action between the same parties, and a writ of error upon it delivered before judgment, upon which the steward returns the former judgment. *Ray. 189.*

(Q) The Course of the Court.

THE course of the court is the law of the court.

And the judges will generally take notice of the course and law of every court.

As, upon a writ of error, the court of *B. R.* will take notice what are the particular laws and customs of the place where the judgment was given, without a return of them upon record: as, that the proceedings in *Berwick* are in *English*. *R. 1 Sal. 269.*

So, of the form of pleading, &c. in *C. B.* the court of *B. R.* will take notice; for it cannot be tried, if it should be specially assigned. *R. 2 R. 3. 9. b.*

[The judge of an inferior court cannot grant a new trial; but for matters of irregularity, where the proceedings are contrary to the practice and rules of the court, he may set aside the judgment. *Semb. Bayly v. Boorne, M. 7 G. Str. 392. Blacquiére v. Hawkins, B. R. E. 20 Geo. 3. Dougl. 379.*]

[He may set aside a writ of inquiry or judgment, tho' strictly regular, if obtained by fraud or surprise. *Rex v. Urling, M. 4 G. Fort. 198.*]

[He may set aside a regular interlocutory judgment, in order to let in the trial of the merits. *Rex v. Peters, P. 31 G. 2. 1 B. M. 568.*]

[He may set aside a verdict, when after notice of trial a reference is agreed to, and plaintiff without new notice goes to trial. *Jewell v. Hill, H. 8 G. Str. 499.*]

[He may set aside a verdict for irregularity, but not upon the merits. *Rex v. Peters, P. 31 G. 2. 1 B. M. 568.*]

In what Court Error shall be brought.

Vide Pleader, (3 B 1, &c.)

In what Court a Quit for the King's Debt shall be brought.

Vide Dett, (G 11.)

Suit of Court.

V. de Copyhold, (K 13, &c.)

COURTS.

Erection of Courts.

Vide Prerogative, (D 28.)

Proceedings in Courts, when Evidence.

Vide Evidence, (C 1.)

For more concerning Courts, *vide Abatement, (D 6.)—Assise, (B 7.)—Audita Querela, (E 2.)—Dismes, (M 5, &c.)—Execution, (I 1, &c.)—Privilege, (A 1.—C 1.)—Prohibition.—Quo Warranto, (C 1.)*

CREDIT.

Bill of Credit.

Vide Merchant, (F 3.)

CREDITOR.

Vide Bankrupt, (D 3.)

CREEK.

Vide Navigation (C).

CROSS-REMAINDERS.

Vide Devise, (N 14, 15.)

CROWN.

Vide Franchises, (G 1.)—Prerogative.—Roy, (A 1, 2.)—Scotland, (D 2.)

Limitation of the Crown.

Vide Parliament, (H 18, 19.)

Pleas of the Crown.

Vide Action, (D 1.)—Justices.—Justices of Peace.

CUI ANTE DIVORTIUM.

Vide Dum fuit infra Ætatem (G).

CUI IN VITA.

Vide Baron and Feme, (I 3.)

CUM PERTINENTIIS.

Vide Grant, (E 9.)

CURIA CLAUDENDA.

Vide Droit, (M 1, 2.)

CURSING AND SWEARING.

Vide Justices of Peace, (B 23.)

CURTESY OF ENGLAND.

Vide Copyhold, (K 1.)—Estates, (D 1, 2.)—Waste, (F 2.)

CURTILAGE.

Vide Grant, (E 7.)

CUSTOM.

Custom.

Vide Chancery, (2 Y—3 D 3.)—Copyhold, (K 1, &c.—S 1, &c.)—Dismes, (H 16.)—Dower (B).—Guardian, (G 1, &c.)—Parceners (B).—Parliament, (R 24.)—Pleader, (C 38.)—3 K 3. 28.—Prohibition, (F 12.)—Trade, (D 2.)

Customs.

Vide Parliament, (H 11, &c.)—Prerogative, (D 43, &c.)—Trade, (C 1, &c.)

Customs of London.

Vide Guardian, (G 1, &c.)—London, (M—N 1, &c.)—Wast, (B 1, 2.)

Customs and Services.

Vide Droit (G).

Customary Conveyance.

Vide Baron and Feme, (G 4.)

Customary Court.

Vide Copyhold, (R 2, &c.)

CUSTOS BREVIUM.

Vide Courts, (C 3.)

CUSTOS REGNI.

Vide Roy, (H 1, 2.)

CUSTOS ROTULORUM.

Vide Chancery, (B 4.)—Justices of Peace, (D 4.)

CUSTOS SPIRITUALIUM.

Vide Prerogative, (D 26, 27.)

C Y P R E S S.

Vide Condition, (L 1.)

D A M A G E - F E A S A N T.

Vide Distress, (B 4.)—Pleader, (3 K 21, &c.—3 M 26.)

D A M A G E S.

(A) Damages, when recovered.

(A 1.) By the Common Law.

BY the common law, in all actions personal and mixt, damages were recoverable. 2 *Inst.* 286.

And tho' the plaintiff recovers the thing itself demanded, yet he also recovers damages: as, in *detinue*. 2 *H.* 6. 15.

In attaint; tho' he obtains a reversal of the former verdict. 1 *Rol.* 574. l. 47.

In ward of the body and land. 17 *Ed.* 3. 72. b.

In prohibition. 1 *Rol.* 575. l. 30.

In *audita querela*. 1 *Rol.* 575. l. 20.

In account, as receiver. R. 1 *Rol.* 575. l. 45. 55. 1 *Leo.* 302.

Vide post. (A 2.)

In an appeal of mayhem; tho' he does not count for damages. 1 *Rol.* 575. l. 17.

So, in all actions upon statutes, which give damages to the party grieved, or a certain penalty, the plaintiff recovers damages over and above the penalty. R. 1 *Rol.* 574. l. 20. 35.

So, in an action founded upon a statute, which prohibits any thing.

In actions where damages are recoverable, the successor, where he is elective, shall recover damages for the time of his predecessor. 1 *Rol.* 569. l. 20. 25.

(A 2.) When not.

But by the common law no damages were recoverable in a real action. 2 *Inst.* 286. 10 *Co.* 116. a.

Nor, in an assise, except against the disseisor himself. 2 *Inst.* 284.

Nor, in a *quare impedit*. 2 *Inst.* 362.

Or, partition. 1 *Rol.* 575. l. 14.

Nor, in a *perambulatione faciendâ*. 1 *Rol.* 575. l. 7.

Nor, in disceit, upon a recovery by default. 1 *Rol.* 575. l. 23.

Nor, in account. 1 *Rol.* 575. l. 8. 11. *Vide ante*, (A 1.)

Nor, in *warrantia chartæ*, where the plaintiff recovers *pro loco & tempore*. 1 *Rol.* 574. l. 49.

Nor, in a *scire facias*, or other writ of execution. 1 *Rol.* 574. l. 42. Nor,

Nor, in an information, or action by *qui tam* upon a penal statute, tho' it be for a certain penalty. *R. 1 Rol. 574. l. 40.*

A successor who is presentative, as a parson, &c. shall not recover damages for the time of his predecessor. *1 Rol. 569. l. 22.*

Nor, an heir, or executor, for the time of his ancestor or testator. *1 Rol. 569. l. 15. 17.*

Nor, a reversion upon a term for years, if he recovers in an assise. *1 Rol. 569. l. 30.*

(A 3.) When by Statute.

Yet, now by the *st. of Merton*, 20 H. 3. 1. damages shall be recovered in dower *unde nihil habet*.

By the *st. of Glouc.* 6 Ed. 1. 1. in a writ of entry *sur disseisin*: be it in the *per*, in the *per* and *cui*, or in the *post*. *2 Inst. 286. Dy. 370. b.*

In an action against the alienee of the disseisor, if the disseisor has not sufficient.

And, by equity, against any one, who has the land from the disseisor by title, or by wrong. *2 Inst. 284.*

So, by the same statute, in *murdr'ancestor*, *cofinage*, *aiel*, or *besaiel*, or other action against the tenant for his own intrusion, or his own act. *2 Inst. 287. 289.*

And the damages shall be computed for the time from the death of the ancestor to whom the demandant makes himself heir. *2 Inst. 288.*

So, by the *st. W.* 2. 5. in an assise of *darrein presentment*, and *quare impedit*, *adjudicentur damna*, viz. *si tempus semestre transferit per impedimentum alicujus, & episcopus ecclesiam conferat, & verus patronus ea vice presentationem suam amittat, sint damna ad valorem ecclesie per duos annos: si tempus semestre non transferit, damna ad valorem medietatis ecclesie per unum annum.*

And, therefore, where the patron loses his presentation, *hac vice*, he shall recover damages to the value of the church for two years. *2 Inst. 362.*

If the bishop has not collated by lapse, he has his election to recover double damages, and lose his presentation; or to recover his presentation, and single damages only. *2 Inst. 362.*

If the patron recover within six months, he shall have damages only for half a year. *2 Inst. 362.*

Tho' the bishop has collated within that time; for, the collation being unlawful, he shall not lose his presentation. *2 Inst. 363.*

But the king shall not recover damages in a *quare impedit*: for he is not within the *st. W.* 2. 5. *R. 6 Co. 51. a. Semb. 1 Leo. 150. Cro. El. 162.*

By the *st. 7 H. 8. 4. & 21 H. 8. 19.* an avowant, &c. shall recover damages and costs. *Dub.* Whether he shall recover damages. *2 Rol. 75.*

By the *st. 33 H. 8. 39.* in all suits on specialty to the king, the king shall recover costs and damages, as common persons use to do in suits for their debts.

[By 13 G. 2. c. 21. persons drowning coal-pits (except the owners) shall pay treble damages and full costs.]

Vide C. 11. (C 1, &c.)

(B) To whom Damages belong.

THE damages shall be to him who sustains the loss: and therefore, in waste by a surviving sister and niece, for waste in the life of the other sister, the aunt only shall recover the damages, and not the niece. *Co. L. 198. a.*

So, if the aunt and the niece join in a *mortd'ancestor*, the aunt only shall recover the damages until the death of her sister. *2 Inst. 288.*

But where the aunt and niece join for waste done in their time, they both shall recover damages. *2 Inst. 305.*

Or, in *mortd'ancestor*, both shall recover damages for the time after the death of the deceased sister. *2 Inst. 288.*

So, if they join in waste, as they may, for waste done in the time of the deceased sister, and also in their own time; the aunt only shall have judgment for the damage in the life of her sister, and both shall have judgment for the place wasted, and treble damages for the waste done afterwards. *2 Inst. 305.*

(C) Damages, how saved.

IF the defendant in dower *unde nihil habet* comes at the first day, and pleads *touts temps prist*, and this cannot be denied, he shall save his damages. *Co. L. 32. b.*

So, in admeasurement of dower, if the defendant at the first day pleads, *prist d' admeasure*. *1 Rol. 573. l. 45.*

So, in dower, if at the first day of the summons the heir comes and pleads *touts temps prist*, and the demandant does not reply, a request; for the heir has title. *Co. L. 32. b. 33. a.*

So, in *detinue*, if the garnishee comes the first day and acknowledges the condition broken, he shall save his damages; for they are given against him for his delay. *1 Rol. 573. l. 49. 8 H. 6. 11.*

So, if he makes default. *1 Rol. 573. l. 52.*

So, in *detinue of charters* against an executor, upon a *devenerunt ad manus* after the death of the testator, if he pleads *tout temps prist* after the charters came to his hands. *1 Rol. 574. l. 5.*

But the defendant does not save his damages, if he does not come upon the first process, at the first day after the return. *1 Rol. 573. l. 54. 574. l. 8.*

So, a wrong-doer does not save his damages, if he comes the first day: as, in *aiel*, *cofnage*, &c. if the tenant at the first day tenders the land, and pleads, *touts temps prist*. *Co. L. 33. a.*

(D) To what Time allowed.

IN personal actions, damages are allowed only to the time of the action commenced.

[For money lent, *interest* shall be given from the time the money was payable to the time of liquidating the debt, by the courts giving judgment. *2 Brown, 1081. 1086.*]

[So, on a bill of exchange it is usual to calculate the interest up to the time when judgment may be entered up.]

[And it is now settled as a general rule, that where a new action may be brought, and a new satisfaction obtained on that, for duties or

or demands arisen since the commencement of the *depending* suit, these shall not be included in the judgment on the former action: but where the interest is an accessory to the principal, and the plaintiff cannot bring a new action for interest *grown due* between the commencement of the action, and the judgment it shall be included. 2 *Brown*, 1086, 1087.]

[In an action on a bond payable with *Indian* interest; plaintiff is entitled to have the sum lent, together with *Indian* interest up to the time of *signing the judgment*; and the *legal* interest of this country on the accumulated sum ascertained by the judgment, from the time of signing the judgment, till *actual payment* of the money. *Id.* 1096.]

[But he cannot recover the latter without another action. *Vide Bur.* 1096 to 1098. unless the delay has been occasioned by a writ of error, and then, a court of error may give interest or damages on the sum recovered by the original judgment on the affirmance of it. *Doug.* 752. n.]

[And a jury may give interest on book-debts in the name of damages. *Id.* 676.]

But in real actions, the demandant shall not count of damages: for he shall recover till the time of the verdict. 10 *Co.* 117. a.

Or, if a writ of inquiry be awarded, till the time of the writ. 10 *Co.* 117. a.

(E) How assessed.

(E 1.) By the Jury which tries the Issue.

IN all cases where the issue is tried by a jury, and damages are recoverable, the damages regularly ought to be assessed by the jury. And, if they do it not, where damages only are recoverable, the verdict shall be void.

And the omission cannot be supplied by a writ of inquiry; for thereby the defendant will lose the benefit of a writ of attain, if the damages are excessive. *R.* 11 *Co.* 56. a. *Vide post.* (E 2. 8.)

Nor, by a release of damages. *Vide post.* (E 2. 8.) *contra.*

So, if there be several defendants, and one makes default, and the other pleads to issue; tho' a writ of inquiry be awarded upon the default to avoid a discontinuance, yet it does not issue; for the jury which tries the issue shall assess damages against all the defendants. 11 *Co.* 6. *R.* 2 *Cro.* 349. 1 *Leo.* 141.

So, if the defendants plead severally, and there are several issues, the jury which tries the first issue shall assess damages against all; and the second inquest need not assess any damages. *R.* 11 *Co.* 5, 6, 7.

And if the second inquest assess damages also, the plaintiff shall have his election *de melioribus damnis*. *R.* 11 *Co.* 5, 6, 7. [*Vide* 1 *Wils.* 30.]

And in such case there is no need of a release of the damages assessed by the other inquest; for the acceptance of the greater damages is a waiver of the less. *R.* *Cro. Car.* 193. *Semb. Cro. Car.* 243.

So, if there be a demurrer to part, or by one defendant, and issue as to other part, or by another defendant, the jury which tries the issue shall assess damages upon the demurrer conditionally. *Lut.* 875. b. 2 *Rel.* 723. l. 5. *D.* 2 *Sand.* 26.

And it shall not be supplied by a writ of inquiry. *Dub. 2 Rol 723. l. 5.*

So, if there be a demurrer upon the evidence, the jury which was charged with the issue may assess damages conditionally. *Cro. Car. 143.*

(E 2.) When they need not.

But where there is judgment, without any issue tried, damages shall be assessed by the court, or by a writ of inquiry. *Vide Pleader, (Z 1, &c.) [Vide Doug. 316. n.]*

[The court will not refer the ascertaining of damages to prothonotary. *Barnes, 428.*]

So, if there be a demurrer to the evidence upon a trial, the jury may be discharged without assessing the damages, which shall be supplied by a writ of inquiry. *R. Cro. Car. 143.*

So, in *replevin*, if the plaintiff be nonsuited at *nisi prius*, and the jury do not inquire for the avowant, it may be supplied by a writ of inquiry. *R. 2 Rol. 112.*

So, if there be judgment for debt as well as damages, and the jury do not assess any damages, it may be aided by a release of the damages: as, in debt, annuity, &c. *11 Co. 56. a. Bentham.*

So, in ejectment of the custody of the land and of the heir, and intire damages, where they do not lie for the heir; it shall be aided, if the defendant releases his damages, and takes judgment for the land only. *11 Co. 56. a. Vide post. (E 5, 6.)*

Vide post. (E 8.)

(E 3.) To what Value.

(E 3.) *Not more than in the declaration.*] So, the jury cannot regularly assess more damages than are alleged by the plaintiff in his declaration. *10 Co. 117. 1 Rol. 578. l. 5. R. Yel. 45. 70.*

[If the jury (by allowing interest on a judgment) give greater damages than laid; on error brought, plaintiff shall not have liberty in another term to remit the surplus, to enter judgment for the damages laid only. *Wray v. Lister, P. 12 G. 2. Str. 1110.*]

[Where a verdict is given for a greater sum than the amount of the damages laid in the declaration, and for that cause a writ of error is brought, the court will permit the plaintiff to enter a *remittitur* of the excess above the sum laid, on payment of the costs of the writ of error. *Pickwood v. Wright, C. P. T. 31 Geo. 3. 1 H. Bl. 643.*]

Nor more for damages and costs together; for it does not appear how much was intended for damages. *1 Rol. 578. l. 45.*

So, the plaintiff shall not recover more damages against a vouchee than are in the count; for he comes *loco tenentis*. *1 Rol. 578. l. 7.*

The damages ought to be assessed in direct terms; for it is not sufficient to say, that the defendant took goods to the value of 20*s*.

But the jury may assess for damages as much as the plaintiff has counted for; and also for costs, beyond that sum. *R. Cro. El. 866. 10 Co. 117. b. 1 Rol. 578. l. 35. R. 2 Cro. 69. 297. R. Yel. 70.*

So, the court may tax, for damages and costs together, beyond the damages alleged in the declaration: as, in debt *ad damnum* 10*l*. judgment *quod recuperet debitum & damna sua, &c.* *ad 12 l.* is well. *R. 1 Rol. 579. l. 5.*

So,

So, in real actions, where no damages are mentioned in the count, the demandant shall recover his damage to the time of the verdict, or writ of inquiry. 10 Co. 117. a.

So, in *detinue*, the plaintiff may recover against the garnishee more damages than were alleged in the declaration; because he recovers for delay after his declaration. 1 Rol. 575. l. 10.

[If a jewel, for which *trover* is brought, is not produced, it shall be presumed to be of the finest water, and damages shall be given accordingly. *Armory v. Delamire*, H. 8 G. Str. 505.]

[In action against the sheriff for false return on mesne process, in debt on judgment where the defendant is in bad circumstances, the whole debt given in damages against the sheriff. Had the defendant been in good circumstances, not so much. *Powell v. Hord*, M. 12 G. Str. 650.]

[In debt against a sheriff or gaoler for an escape, the jury cannot give a less sum than the creditor would have recovered against the prisoner, viz. the sum indorsed on the writ, and the legal fees of execution. 2 Term Rep. 126.]

(E 4.) *When less.*] So, the jury may assess damages to any value under the declaration; as, to a penny, farthing, &c.

So, to half a farthing, &c. R. 2 Rol. 21.

So, upon a catching bargain, the jury may reduce the damages to a reasonable sum: as, where a promise was to pay for a horse a barley-corn, a nail, and double every nail, &c. they may give the value of the horse. R. 1 Lev. 111.

But, if the jury find according to the promise of the defendant, they are not subject to an attainder. *Semb.* 3 Lev. 150. Mo. 419.

So, where the jury of course find the damages alleged in the count, without evidence, they shall not be subject to an attainder for it. Dy. 369. b.

So, where the defendant confesses, or admits the damages for which the plaintiff counts, the jury ought to find so much; as, in trespass for *rescous* of a distress *ad damnum* 40 l., if the defendant justifies by special matter, he admits the damages. 1 Rol. 578. l. 15.

So, in prohibition, if the defendant acknowledges the contempt alleged. 1 Rol. 578. l. 20.

So, in debt upon the *st.* 2 Ed. 6. 13. for not setting out his tithes, to the damage of 200 l., if the defendant does not take the damages by protestation, but pleads a discharge by the *st.* 31 H. 8. 13. and there is issue upon it. R. Al. 88.

So, in an action in the *debet & solvet*, for subtracting suit to a mill, if the defendant confesses the action. 1 Rol. 578. l. 25.

In a writ of right of ward, if the defendant acknowledges his right to the ward. 1 Rol. 578. l. 27.

Yet a demurrer to a declaration does not amount to a confession of the damages, for which the plaintiff counts. 1 Rol. 578. l. 30.

[In debt for a penalty in articles, the jury ought to assess damages on the breach assigned, according to the statute 8 & 9 W. 3. c. 10. and shall not find the debt; otherwise a *venire de novo* shall be awarded. 2 Will. 377.]

[In an action on a bond damages may be recovered for more than

the amount of the penalty. *Lonsdale v. Church*, B. R. E. 28 Geo. 3. 2 T. R. 388.

(E 5.) When assessed severally.

In an action against divers persons, who are found guilty of several takings or offences, damages ought to be assessed against them severally; as, in trespass for a battery and goods, if one be found guilty for the battery, and the other for the goods taken. 1 Rol. 570. l. 42.

[In action upon the case for malicious prosecution, of indictment of felony, whereof plaintiff acquitted, against prosecutor and the justice who committed, several damages assessed. *Lane v. Santelow*, H. 4 G. Str. 79.] *Sed vide infra*, (E 6.) *contra*.

In debt against divers by several *præcipes*. 1 Rol. 570. l. 40.

In *decies tantum* against divers, damages shall be against them severally; for they are several takings. 1 Rol. 570. l. 35.

So, in an action against divers, if one is found guilty at one time, and another at another, several damages shall be assessed.

[In trespass against several defendants, though some plead to issue and are acquitted, yet damages shall be assessed against the defaulters. *Jones v. Harris*, H. 12 G. 2. Str. 1108. *Cressy v. Webb*, H. 18 G. 2. Str. 1222.]

[In trespass against several, *A.* lets judgment go by default, *B.* demurs, and *C.* pleads Not guilty; and it comes on to assess damages against *A.*, contingent damages against *B.*, and for trial as to *C.*, who is acquitted; several damages may be assessed against *A.* and *B.* *Chapman v. House*, T. 13 G. 2. Str. 1140.]

So, if several causes of action are joined in one declaration against the same defendant, the damages may be severally assessed. *Vide post*. (E 6.)

And it is safest for the plaintiff; for, if for one cause an action does not lie, the plaintiff shall have his damages and costs for the other; and the judgment shall be reversed or arrested only for that part, which has not a good cause of action. *R. Cro. El.* 537. *R. 1 Rol.* 24. *R. Mo.* 708.

As, in *ejectione custodiæ terræ & heredis*, if intire damages are given, it will be bad for the whole; because the action does not lie for the wardship of the heir. *Dy.* 369. b. *Vide ante*, (E 2.)—*Post*. (E 6.)

In trespass *quare clausum fregit*, and for battery of his servant, without saying, *per quod servitum amisit*, if intire damages are given, it will be bad for the whole. *R. 10 Co.* 130. b.

[If assault is well laid, and then *cumque etiam*, and another assault, and intire damages, it is ill. *Amyon v. Shore*, H. 11 G. Str. 621.]

[In battery, two counts, the first good, the second with a *cumque etiam*; and because damages were intire, judgment was arrested. *Rudge v. Onon*, P. 5 G. Fort. 376.]

[If *A.* and *B.* bring trespass for breaking and entering the house of *A.* and taking the goods of *A.* and *B.*, and intire damages given, it is ill. *Maddox v. Taylor*, P. 11 G. 2 Ld. Raym. 1381.]

In *assumpsit* to stand to an award, and not sue execution, and a breach assigned for both, and intire damages; if the award was void, it will be bad for the whole. *R. 10 Co.* 131.]

So, in an action for words alleged at several times, and the words
at

at one time are not actionable. 1 *Roll.* 576. l. 20. *Per Popham, Cro. El.* 329. *Cro. Car.* 328. 1 *Lev.* 134.

So, in covenant, *assumpsit*, &c. if the breach be for not surrendering land and giving an obligation, and intire damages; where the breach in not giving the obligation is null. *R. 2 Cro.* 115.

So, in an action upon the case, if the plaintiff prescribes for honey, wax, dead wood, goods of felons, &c. and intire damages are given; where for some of the things the prescription is bad; judgment shall be stayed for the whole. *R. Mo.* 707. *Cro. El.* 560.

So, if the plaintiff entitles himself to a mill by a lease of *fac.*, and assigns a breach for not grinding from 2 *fac.* to the 12 *fac.*, and general damages are given; the plaintiff shall not recover for any part. *R. Mo.* 887.

So, in an action upon the case, if the plaintiff charges the inveigling away his apprentice, by which he lost his service for the residue of the term, which is not yet expired, and the jury give damages generally; it will be bad for the whole. *R. 2 Sand.* 171.

So, in covenant, if several breaches are assigned, and intire damages; if any breach be insufficient, it will be bad for the whole. *R. 1 Sand.* 154.

So, intire damages *de incremento* given by the court are void for the whole, if the action does not lie for part. *R. Mo.* 708.

[In action for words, some whereof not actionable; if damages intire, plaintiff shall have new *venire facias*, that they may be severed. *Barnes*, 478. 480.]

(E 6.) When not.

But where there is a joint cause of action, against divers persons, damages ought not to be assessed severally; and if they are, a *venire facias de novo* shall go: as, in trespass against several, if they be all found guilty of the same trespass. *R. 11 Co.* 5. b. *Heydon. Carth.* 20.

[If two defendants in trespass suffer judgment by default, and the plaintiff execute writs of inquiry against them separately, and take several damages against them, it is irregular; and if the plaintiff enter up final judgment with those several damages, it is erroneous; but the court will permit the plaintiff to set aside his own proceedings before final judgment on payment of costs. *Mitchell v. Milbank*, *B. R. H.* 35 *Geo.* 3. 6 *T. R.* 199.]

[If two defendants confess the trespass, the damages cannot be severed; and if severed, judgment shall be arrested. *Onslow v. Orchard*, *P. 7 G. Str.* 422.]

Or, tho' they plead severally. 11 *Co.* 5. b. *R. 2 Cro.* 384.

Or, one pleads *Not guilty*, and the other justifies. *R. Cro. El.* 860. *R. 2 Cro.* 118.

Or, if the declaration be against *A. simul cum B.*, and against *B. simul cum A.* *R. 2 Cro.* 348.

So, if one, to trespass for assault, battery, imprisonment, and taking of goods, pleads *Not guilty* to the whole, and the other to the assault pleads *son assault*, and says nothing to the imprisonment or goods, and it is found for the plaintiff against both; damages shall be assessed generally for the whole: for the trespass being joint in the whole,

and he who pleaded *son assault* being guilty for that, will be guilty of the whole. R. 3 Lev. 324.

[In an action against several for a malicious prosecution, damages cannot be assessed severally. *Lowfield v. Bancroft*, T. 5 G. 2. Str. 910. *Sed vide supra*, (F. 5.) *contra*.]

So, if a plaintiff joins several causes of action in the same declaration, against the same defendant, intire damages may be assessed: for it will be at the peril of the plaintiff if any cause is not sufficient, in which case, judgment shall be reversed for the whole; and the defendant has no prejudice: as, in *assumpsit* upon several promises. R. 1 Rol. 570. l. 12. 1 Rol. 423. 3 Bul. 258.

As, in ejection, of the wardship *terre & heredis*, an intire damages: for it does not lie for the wardship of the heir. R. Dy. 369. b. *Vide ante*, (E 2. 5.) *Vide infra*.

So, in waste for several wastes in several places, intire damages may be assessed. R. 1 Rol. 569. l. 50. Cro. Car. 414.

And tho' in trespass, *trover*, &c. for goods, some are expressed insensibly, in *English*, or false *Latin*, and intire damages are assessed, it will be well; for the damages shall be intended to be all given for the other goods. R. 10 Co. 130. 133. b. *Vide Courts*, (P 9.)

So, in an action for words all spoken at the same time, tho' some be not actionable, and intire damages assessed; they shall be all intended for the actionable words. R. 10 Co. 130. b. R. Mo. 142. 1 Rol. 576. l. 15. R. Cro. El. 329. 787. R. Cro. Car. 328.

So, if the defendant pleads to the words not actionable *Not guilty*, and justifies for the others, and issue upon it; if intire damages are given, they shall be intended for the actionable words: for upon the whole matter it appears all the words were spoken at the same time. R. 1 Rol. 576. l. 25.

So, if words not actionable are of the same import with the former, and are alleged *ex ulteriori malitia*, and thereby refer to the former. R. Cro. Car. 327. Dub. Sho. 80.

[Where some counts in a declaration for slander are good and some bad in law, and general damages are given, the court will arrest the judgment *in toto*, and will not award a *venire de novo*. *Holt v. Scholefield*, B. R. T. 36 Geo. 3. 6 T. R. 691.]

So, in *assumpsit* by an innkeeper against *A. pro hospit.* B. at his request, and that he found *pro hospitio prad.* such a sum, viz. so much *pro esculent.*, so much *pro poculent.*, so much for apparel; after verdict, damages shall not be intended *pro vestitu*, which it does not belong to an innkeeper to find. R. 2 Rol. 79.

So, if, in a breach assigned, some words are insensible, the damages shall not be intended for them. R. 2 Rol. 577. l. 35.

So, if the plaintiff charges for imprisonment 7 July, and that the defendant afterwards, viz. 2 June, (which was a time prior,) menaced him, whereby from the said 2 June *negotia intendere nequit*; the time after the viz. shall be rejected, and no damages intended for that. R. 1 Rol. 576. l. 40.

So, if the plaintiff assigns several breaches, and one is insensible and insignificant, no damages shall be intended for that. R. 1 Rol. 577. l. 15.

Or, in covenant, where the plaintiff shews several covenants, and shews a breach only upon one; all the damages shall be intended for that on which the breach is assigned. R. 2 Rol. 178. So,

So, if intire damages are given, when an action does not lie for part, if the plaintiff releases his damages and costs, he shall have judgment for the part which is good; as, in ejectment of ward of the land and heir, where it does not lie for the heir. *Dy. 370. a. Vide ante, (E 2. 5.) Vide supra.*

In *replevin*, if the avowant has a verdict, which gives damages for the whole rent, when he was entitled only to two thirds; he shall have judgment *pro retorno habendo*, if he releases his damages. *R. Ma. 28^r.*

In an action on the case, if the defendant pleads *Not guilty* to part, and justifies for part in another county, upon which there is a mistrial as to one issue; if the plaintiff releases his damages as to that, it is sufficient. *R. 2 Cro. 127.*

So, if several damages are given, and intire costs, and the plaintiff has judgment only for part; he shall have intire costs. *Hob. 6. Vide Costs, (A 1, &c.)*

[If there is an issue to one count, and demurrer to another, and plaintiff is nonsuited on the issue, damages cannot be assessed on the demurrer. *Snow v. Como, H. 8 G. Str. 507.*]

(E 7.) Damages increased.

When increased upon view of a mayhem. *Vide Battery, (E 3.)*

Damages may be increased by the court, where the principal demand is certain: as, in account. *10 H. 6. 24. b.*

In debt upon an obligation, where the deed is denied. *1 Rol. 572. l. 27.*

So, if the plea be sent to be tried in a foreign county; for the jury there have not full knowledge of the fact. *1 Rol. 572. l. 50.*

So, where the court can assess damages without a writ of inquiry, they may increase them after a writ of inquiry upon a demurrer, or judgment by default. *R. 1 Rol. 573. l. 5.*

So, the court may increase damages upon the view of any justice of the court *en pais*. *1 Rol. 572. l. 22.*

And where the court can increase, they may mitigate damages. *1 Rol. 572. l. 25. 28. 573. l. 7.*

But the court cannot increase damages, where the damages are the principal, and the court has not certain knowledge of the cause by the record, or other apparent matter: as, in an action for slander, tho' the defendant justifies. *1 Rol. 572. l. 3.*

In trespass for trees cut. *1 Rol. 572. l. 30. 1 Brownl. 204.*

So, justices of *Nisi prius* cannot increase damages. *1 Rol. 573. l. 30.*

Nor, the court upon the certificate of justices of *Nisi prius*. *1 Rol. 572. l. 20.*

[In debt upon recognizance, bail in error in the *Exchequer-Chamber* are not liable to pay interest on the judgment between the signing of the judgment in *B. R.* and the affirmance of it in *C. S.* But as to the interest due subsequent to the time of the affirmance, that stands on a different ground. *Frith v. Levoux, B. R. M. 28 Geo. 3. 2 T. R. 57.*]

[In debt on a judgment affirmed in error, the jury by way of damages may give interest upon the sum recovered by the judgment from the time of signing it, where by the practice of the court in

which error is brought, such interest is not allowed in costs upon the affirmance. *Entwistle v. Shepherd*, B. R. M. 28 Geo. 3. 2 T. R. 78.]

(E 8.) Defect in assessing aided by Release.

So, where damages are not the only thing to be recovered, the plaintiff may supply a defect in the assessment of the damages, by his release of the damages: as, in debt, annuity, &c. 11 Co. 56. a. *Bentham*.

So, where more damages are assessed than the declaration mentions, the plaintiff may aid it by a release of so much as exceeds the declaration. *Semb. Ow. 45. R. Yel. 45.*

So, if in a joint action of trespass, &c. several damages are assessed; it shall be aided by a release, or *nolle prosequi* against all but one defendant. *R. Carth. 21.*

So, if it be doubtful whether damages can be given, he may release the damages, and not the costs. 2 *Rol. 75.*

And release of the damages may be at any time before judgment. *Ibid.*

But if the jury do not assess damages, where damages only are recoverable, it cannot be aided by a release. *Vide ante*, (E 1.)

So, a default in assessment of damages cannot be supplied by a writ of inquiry: for then the defendant will lose the benefit of an attain, if they are excessive. *Vide Pleader*, (Z 1, &c.) *Vide ante*, (E 1.)

Vide Pleader, (S 25.)

DARREIN PRESENTMENT.

Vide Quare Impedit, (C 1, &c.)—*Abatement*, (H 26.)

DARREIN SEISIN.

Vide Seisin.—*Abatement*, (H 25.)

D A T E.

Vide Fait, (B 3.)

D A Y.

Vide Ann (C).

Dies Dominicus.

Vide Temps, (B 3.)

Dies Juridici.

Vide Temps, (C 1, &c.)

Year and Day.

Vide Temps, (B 1.)

Year, Day, and Waste.

Vide Ann, Jour, & Waste.

Comperuit ad Diem.

Vide Pleader, (2 W. 31.)

Solvit ad Diem.

Vide Pleader, (2 W. 29.)

DEAN AND CHAPTER.

Vide Ecclesiastical Persons, (C 3.)

DEATH.

Death of the Incumbent.

Vide Esglise, (N 1.)

—— of Justices.

Vide Abatement, (H 39.)

—— of the King.

Vide Abatement, (H 38.)—Justices of Peace, (A 8.)—Officer, (K 10.)

—— of a Party.

Vide Abatement, (E 17.—H 32, &c.)—Bail, (Q 5.—R 5.)

—— of a Stranger.

Vide Abatement, (H 36.)

—— of a Testator.

Vide Chancery, (3 Y 17.)—Devise, (N 21.)

—— of a Vouchee.

Vide Abatement, (H 37.)

Dying seised.

Vide Discent, (D 2, 3, 4.)

D E B T.

Vide Dett.

Vide Action upon the Case for a Deceit. — Chancery, (3 F 1, 2.) — (3 M 1, &c.—3 N 1.—4 D 3.—4 H 4.—4 L 1.—4 O 2.)—Covin. — Justices of Peace, (B 30, &c.)—Leet, (L 6, &c.)—Parliament, (L 38.)—Pleader, (2 H.)

Writ of Disceit.

Vide Ancient Demesne, (E 2.)

DECIES TANTUM.

Vide Enquest, (F.) — Pleader, (S 46.)

DECLARATION.

Declaration in Pleading.

Vide Count.

Declaration of Uses.

Vide Uses, (D 1, &c.)

DECREE.

Vide Chancery, (Y 1, &c. and other Places in the same Title.) — Evidence, (C 1.) — Sewers, (H 1, &c.) — Uses, (N 20, &c.)

DEDIMUS POTESTATEM.

Vide Chancery, (K 3.—P 2, &c.) — Fine, (E 7.)

DEED.

Vide Fait.

DEER-STEALING.

Vide Justices of Peace, (B 47.)

DEFAMATION.

Vide Action upon the Case for Defamation. — Libel. — Pleader, (2 L 1, &c.) — Prohibition, (G 14.)

DEFAULT.

Vide Abatement, (H 52.—I 27.) — Enquest (E). — Justices of Peace, (B 101.) — Pleader, (B 11, 12.) — (E 42.—Y 1.—3 L 8.—3 M 28.) — Remitter, (C 5.)

DEFEAZANCE.

(A) What shall be.

A Defeazance is an instrument which defeats the force or operation of some other deed, or estate. And that which in the same deed is called a condition, in another deed is a defeazance.

As,

As, if a man covenants or grants that upon payment of a less sum at such a day, an obligation, recognizance, &c. shall be void. *R. Cro. El. 623.*

If a defeazance be absolute and perpetual, it amounts to a release, *Per Holt, Sho. 46. Carth. 64. Vide Pleader, (2 V 12. — 2 W 35. 37.)*

So, a licence, that he shall not be sued upon such an obligation, &c. amounts to a defeazance. *Carth. 64.*

[One deed may amount to a defeazance of another without express words of relation. *Trevitt v. Angus, C. P. T. 11 & 12 Geo. 2. Willes, 107. Com. 568. S. C.*]

(B) When it shall be good.

(B 1.) Of a Thing executory.

THINGS executory may be defeated by a defeazance made at the same time, or at any subsequent time. *Co. L. 236. b.*

As, a recognizance, statute, obligation, &c. may be defeated by a defeazance at a subsequent day, as well as upon the same day. *Co. L. 237. a. Adm. Cro. El. 755. R. cont per three J. but Sand. acc. 2 Sand. 48. Acc. Mo. 811. R. Cro. El. 623.*

So, rents, annuity, warranty, &c. *Co. L. 237. a.*

So, a power of revocation. *1 Co. 113. a.*

So, a defeazance, that a statute shall not be extended, as to lands in *A.* is good. *R. Mo. 811.*

If a defeazance be made of a prior defeazance, the first shall be thereby defeated; as, a devise by any subsequent devise. *1 Rol. 590. l. 45.*

(B 2.) Of a Thing executed.

So, inheritances, and things executed, may be defeated by a defeazance made at the same time. *Co. L. 236. b.*

So, an obligation, &c. may be defeated by defeazance after the condition broken as well as before. *R. Carth. 64.*

(C) When it shall not be good.

BUT a thing executed cannot be defeated by a defeazance at a subsequent time: as, a feoffment cannot be defeated by a defeazance at a future day. *Co. L. 236. b. Fitz. Condition, 18.*

Nor, a release to a disseisor; for it is executed immediately. *Co. L. 236. b.*

So, if a thing, executory in its commencement, be executed, a defeazance afterwards is too late: as, if a debt be assigned to the king, *if the barons of the Exchequer allow it*; if the king sues execution, disallowance afterwards by the barons is too late, for the debt was executed by the assignment. *5 Co. 90. b.*

So, a defeazance ought to be by matter as high as the thing which will be defeated: and, therefore, if an obligation be to pay, at such a day, an agreement, *per scriptum manu sua signatum*, to give time to a future day, is not sufficient; for it ought to be by deed. *R. 3 Lev. 234.*

So,

D E F E A Z A N C E.

So, a writing shall not be construed as a defeazance, without a necessity: as, if *A.* covenants to pay *B.* 5*s.* a-week, and 100*l.* at his death, and *B.* by another deed of the same date, reciting the former, covenants to save *A.* indemnified from all debts and securities before made, or afterwards to be made by him; it shall not be construed a defeazance of the covenant of *A.* *R. Sal.* 573.

So, if it be said, *that he shall be indemnified from the covenant*; if it be not added, *that the covenant shall be void.* *R. Sal.* 575.

D E F E N C E.

Vide Abatement, (1 16.)—*Pleader*, (E 27.—3 M 17.)

D E I N J U R I A S U A P R O P R I A.

Vide Pleader, (F 18, &c.)

D E L E G A T E S.

Vide Admiralty (G).—*Prerogative*, (D 14.)

D E L I V E R A N C E.

Second Deliverance.

Vide Pleader, (3 K 4.)

D E L I V E R Y.

Vide Fait, (A 3, 4.—B 5.)—*Pleader*, (2 X 6.)

D E M A N D.

Vide Release, (E 1.)—*Rent*, (D 3, &c.)

D E M I S E.

Vide Abatement, (H 28. 49.)—*Baron and Feme*, (G 3.)—*Estates*, (B 32.)—*Pleader*, (2 W 14. 47, 48.—2 Z 2.—3 O 18.)

D E M U R R E R.

Vide Chancery, (H 1, 2.)—*Pleader*, (Q 1, &c.—2 V 3.—2 W 42.)—*Bail*, (R 7.)

Parol demurring.

Vide Infant, (D 1, 2.)

D E N I Z E N.

Vide Alien, (D 1, &c.)

D E O D A N D.

Vide Waife, (E 1, 2.)

DEPARTURE,

Vide Pleader, (F 7, &c.)

DEPOSIT.

Vide Chancery, (Y 5.)

DEPOSITION.

Vide Chancery, (P 8.—T 4, 5.)—Evidence, (C 4.)

DEPRIVATION.

Vide Prerogative, (D 21, 22.)—Abatement, (H 46.)

DEPUTY.

Vide Officer, (D 1, &c.)—Viscount, (B 1, &c.)

DERELICT LANDS.

Vide Prerogative, (D 61, 62.)

DESCENT,

Vide Discent,

DE SON ASSAULT.

Vide Pleader, (3 M 15.)

DE SON TORT DEMESNE.

Vide Pleader, (F 18, &c.)

DETAINER FORCIBLE.

Vide Forcible Entry.

DETERMINATION.

Determination of the Authority of Justices of Peace.*Vide Justices of Peace, (A 8.)***Determination of an Estoppel.***Vide Estoppel (F).***———— of a Lease for Years.***Vide Estates, (G 10, 11, 12.)***———— of Will.***Vide Estates, (H 6, &c.)*

DETINUE.

(A) When it lies.

DETINUE lies by him who has property in a thing certain, against him who detains it; upon which the plaintiff shall recover the thing detained *in specie*. *Co. L. 296. b. F. N. B. 138. A. E.*

So, it lies by him who has only a special property; as, by a bailee of goods. *Bro. Detinue, 20.*

So, it lies if the plaintiff has a property, tho' he never had possession: and therefore the heir may maintain *detinue* for an heir-loom. *Bro. Detinue, 30. 45.*

If a statute says, that goods imported shall be forfeited, part to the king, and part to him who will seize or sue for them; a subject may have *detinue* for his part of the goods, for the action vests the property in him. *R. 1 Sal. 223. 5 Mod. 193.*

So, it lies, though the defendant came to the possession of the goods by bailment; or by *trover*. *F. N. B. 138. Co. L. 286. b.*

If husband and wife be divorced, *detinue* lies by the wife for goods given with her in *frank-marriage*. *F. N. B. 139. A.*

So, it lies, though the defendant quitted the possession before the action brought by delivery of the goods to another. *Bro. Detinue, 1, 2. 33, 34. 40.*

[Will lie for goods lost and found, as well as for goods delivered. *Kettle v. Bromfall, C. P. M. 12 Geo. 2. Willes, 118.*]

(B) For what Things it lies.

DETINUE lies for money or goods so certainly described that they may be known: as, for money in a chest or bag. *1 Rol. 606. l. 12. 14.*

For particular pieces of silver, or of gold. *R. 1 Rol. 606. l. 25.*

Or, so many ounces of silver, or of gold. *R. Tel. 81.*

So, for money taken in the view of another, tho' it was not in a bag. *1 Rol. 606. l. 16.*

So, it lies for twenty quarters of wheat. *Bro. Detinue, 51.*

(C) For what, not.

BUT *detinue* does not lie for money at large; for one piece cannot be known from another. *Co. El. 286. R. Cro. El. 457.*

Nor, for wheat out of a sack or bag. *Co. L. 286.*

So, it does not lie for an hawk, or other thing of pleasure, tho' reclaimed.

So, it does not lie *de unâ domo vocatâ* a bee-house. *R. 2 Cro. 39.*

(D) When it does not lie.

AND *detinue* does not lie, if the plaintiff has not the general or special property at the time of the action; as, if the defendant took the goods as a trespasser; for by the trespass the property of the plaintiff is divested. *Per Brian, 6 H. 7. 9. a.*

So,

So, if *A.* bails goods to *B.* and afterwards gives them to *C.*, *C.* shall not have *detinue* against *B.* who had a special property by the bailment. *Mod. Ca.* 216.

So, it does not lie against him who never had the goods: and therefore, it does not lie against an executor upon a bailment to his testator, if the goods never came to the possession of the executor. *Bro. Detinue*, 19.

So, it does not lie, if the goods never were detained, by the fault of the plaintiff: as, if the defendant finds goods, and before demand, loses them by accident. *Semb. Bro. Detinue*, 1. 33. 40.

Detinue of Charters.

Vide Charters, (B 1, &c.)—*Pleader*, (2 X 1, &c.—2 Y 6.)

Pleading in Detinue.

Vide Pleader, (2 X 1, &c.)

Nil detinet.

Vide Pleader, (2 W 44.—2 X 3.)

D E B T.

(A) When it lies.

(A 1.) Upon an Act of Parliament.

DE^BT lies upon every contract in deed, or in law.

As, if an act of parliament gives a penalty, and does not say to whom nor by what action it shall be recovered; an action of debt lies upon such statute by the party grieved: as, upon the *st.* 14 H. 8. 5. that every practiser of physic in *London* without licence shall forfeit 5 *l.* a-month, a moiety to the king, a moiety to the college of physicians. *R.* 1 *Rol.* 598. *l.* 25.

Upon the *st.* 2 & 3 *Ed.* 6. 13. which gives the treble value for not setting out of tithes. *R.* 1 *Rol.* 598. *l.* 30. 2 *Inst.* 650.

Upon the *st.* 28 *El.* 4. which says, the sheriff shall take for his fees no more than 12 *d.* for every 20 *s.* under 100 *l.*, and 6 *d.* for every 20 *s.* above 100 *l.*, the sheriff shall have debt for his fees. *R.* 1 *Rol.* 598. *l.* 35. *Mo.* 853. 1 *Sal.* 209. *Latch*, 17. 51. *Vide Viscount*, (F 2.) (*Vide* 1 *Sal.* 331.)

So, for a sum of money payable upon a demise out of land. *Per Holt*, *Sal.* 415. *Mod. Ca.* 26.

Vide Action upon Statute (E 1, 2.—F). *Vide post.* (A 5, 9.)

(A 2.) Upon a Judgment.

So, debt lies upon a judgment, within or after the year after recovery. 43 *Ed.* 3. 2. *b.*

Upon a judgment for debt or damages in a court of *London* by special

cial custom, debt lies in *B. R.* or *C. B.*, tho' the original action could not have been brought there. *R. 1 Rol. 600. l. 45.*

So, it lies there upon a judgment in an inferior court, removed thither by error, or *certiorari*. *Hut. 118. R. 1 Lev. 134.*

[So, it lies on a judgment given in a foreign court; and it is not necessary to state the grounds of that judgment in the declaration. *Doug. 1 to 7.*]

[But the grounds of the judgment may be shewn and impeached by the defendant, for judgments of foreign courts have not that credit shewn to them as judgments in our own courts of record, and they may be examined. *Doug. 6.*]

[So, it would seem, it would lie in the courts of *Ireland* on a judgment here, for the same principle applies to this case, as to the former. *But Semb. contra. 2 Str. 1090.*]

So, it lies for damages recovered in a real action; for, by the judgment, they are reduced to a personalty. *1 Rol. 600. l. 25. 37.*

For damages recovered in waste. *43 Ed. 3. 2.*

For arrearages recovered in account. *1 Rol. 600. l. 40.*

For damages recovered in *right close*, in *antient demesne*. *8 Ed. 4. 6. a.*

So, debt lies upon a judgment on a recognizance against bail. *R. 1 Rol. 600. l. 5. 2 Leo. 14.*

Upon a judgment in *scire facias*. *3 Mod. 188.*

So, it lies in *C. B.* upon a judgment in *scire facias* upon a recognizance in *B. R.* *Dy. 306. a. in marg.*

Debt lies in *B. R.* upon a judgment in *C. B.* removed thither by error. *Semb. 1 Sid. 236.*

So, it lies there upon a judgment there after error brought in the *Exchequer*. *R. 1 Sid. 236. Lut. 602. 1 Lev. 153. Ray. 100.*

Or, after error depending in parliament; for only the transcript of the record is removed. *1 Sid. 236.*

So, it lies in the *marshalsea*, or other court of record, upon a judgment in *C. B.* or *B. R.* *R. 1 Sal. 209.*

So, it lies in *C. B.* upon a judgment there, affirmed upon error in *B. R.* *Co. Ent. 153.*

[So, it lies in *B. R.* or *C. B.* on a judgment of nonsuit in an inferior court. *1 Wilf. 316.*]

But debt does not lie upon a judgment for the arrearages of an annuity, rent-service, &c. for the freehold is continuing. *43 Ed. 3. 2. 1 Rol. 600. l. 32. Vide post. (B).*

Nor, for damages recovered in a court-baron in dower by the *stat. of Merton*, 1. *4 Co. 30. b. 1 Rol. 600. l. 50.*

Nor, does it lie upon a judgment, after execution sued by *elegit*, or otherwise; for he has chosen another remedy. *Vide 1 Rol. 601. Vide Execution, (C 14.)*

[Nor after defendant taken on *ca. sa.* and discharged by plaintiff's consent. *Vigers v. Aldrich, M. 10 G. 3. 4 B. M. 2482.*]

Tho' the defendant, taken in execution, escapes. *1 Rol. 601. l. 32.*

Tho' the *elegit* be not returned, or the plaintiff disagrees to the return. *Dy. 299. b. 1 Rol. 601. l. 25.*

Nor, does it lie, if after judgment the cause is referred, and a *dimititur* entered upon the roll. *1 Rol. 601. l. 30.*

Or, the record be removed by error. *Semb. 2 Vent. 261. if the plaintiff*

plaintiff does not declare upon the special matter; for then it lies. *R.*
 3 *Lev.* 397. *R. cont.* where only a transcript of the record is removed.
 1 *Lev.* 153.

Vide Pleader, (2 *W* 36, &c.)

(A 3.) Upon a Statute, or Recognizance.

So, debt lies upon a statute-merchant; for it is in the nature of an obligation, and has the seal of the party. 1 *Rol.* 599. *l.* 40.

And upon a recognizance in the nature of a statute-staple. *Dub.*
 1 *Rol.* 599. *l.* 50. 1 *Leo.* 52.

So, upon a recognizance before the mayor of *London*, &c. *Dy.* 219.
 1 *Leo.* 284.

Upon a recognizance in *Chancery*. *Dy.* 369. *b.* 306. *a.* *Cro. El.*
 608. 1 *Ver.* 313.; but it ought to be sued by *scire facias* in *Chancery*.

So, it lies in *B. R.* upon a recognizance against bail in *C. B.*
Mod. Ca. 132.

Or, upon a recognizance by bail in the same court. *Mod. Ca.* 159.
R. Trin. 13 *Ann.* in *C. B.* *Vide infra*.

So, debt lies upon a recognizance, tho' he had judgment before in
 a *scire facias* upon the same recognizance, which stands in force. *R.*
Cro. El. 608. 817. [*Vide infra contra*.]

So, upon a writing designed to be a statute-staple, but not executed pursuant to the statute. *R. Cro. El.* 233. 494. *Vide Statute-staple* (A).

But debt does not lie upon a statute-staple; for the seal of the party is not affixed. 1 *Rol.* 599. *l.* 45. *Cont. Semb. Ass. Ent.* 223. 237.

So, it does not lie upon a recognizance by bail in *B. R.*, for the bail will be ousted of the advantage of rendering the body before the return of the second *scire facias*, &c. *Cont.* 1 *Brownl.* 65. *R. acc. Ray.* 14. *Cont. Mod. Ca.* 132. 159. *Vide Bail*, (*R* 1. 9.) *Vide supra*.

Nor, (as it seems,) upon a recognizance by bail in *C. B.* *Cont.*
 1 *Rol.* 600. *l.* 15. *R. cont.* in *C. B. Trin.* 13 *Ann.*

So, it does not lie upon a recognizance, after judgment upon it in a *scire facias*. 1 *Rol.* 601. *l.* 15. 20. [*Vid. supra contra*.]

(A 4.) Upon other Specialty.

So, debt lies upon an obligation, or any other deed or specialty.

As, if a man by obligation, or other deed, acknowledges that he has received money from *A. ad computandum*; *A.* may have debt upon it. 1 *Rol.* 597. *l.* 30.

Or, that he has so much of the money of *A.* in his hands. 1 *Rol.* 597. *l.* 47.

So, if he covenants to pay *A.* a certain sum, debt lies upon it.

Or, to pay his proportion of such a suit, with an averment that his proportion was so much. *R.* 3 *Lev.* 429.

So, debt lies upon a bill to pay 20 *l.* for the true payment of 10 *l.*
R. 2 *Vent.* 106.

So, debt lies upon a tally against a teller, when money comes to his hands. 1 *Rol.* 599. *l.* 32.

[Upon a charter-party, which is a deed. *Hooper v. Shepherd*, *P.*
 11 *G.* 2. *Str.* 1089.]

(A 5.)

(A 5.) Debt for Rent.

So, if a lease be of lands or tenements for years, or at will, rendring rent; debt lies for the rent, by the common law. *Lit. S.* 58.

72. 1 *Sid.* 401.

So, if a lease be for years, or at will, of an incorporeal inheritance; as, an advowson, common tithes, fair, market, franchise, or office, &c. *Co. L.* 47. a.

So, debt lies, tho' the lease be rendring corn, or other collateral thing. *R.* 1 *Rol.* 591. l. 30. 4 *Leo.* 46. 3 *Leo.* 260.

So, if a lease be for life, after the estate of freehold determined debt lies for arrears: as, if a lease be for life, or *pur autre vie*, and the lessee, or *cestuy que vie* dies, debt lies for rent due at his death. 1 *Rol.* 596. l. 17. 20. *Co. L.* 162. a. 4 *Co.* 49. a.

So, if the lessor enters for a condition broken, or a forfeiture, debt lies for rent due before. 19 *H.* 6. 42. b. 1 *Rol.* 596. l. 40.

So, if he recovers for waste. 1 *Rol.* 596. l. 35.

So, if the lessee surrenders to him in the reversion. 4 *Co.* 49. a.

Or assigns to A. who surrenders. 4 *Leo.* 17, 8.

So, if there be a lease for life, feoffment, &c. rendring rent, for ten years, debt lies for it; for during the years, it is but a chattel. 1 *Rol.* 595. l. 10.

So, for rent upon a lease for years upon condition to have the fee, due before the condition performed. 1 *Rol.* 595. l. 15.

So, if rent be granted in fee for life, &c. with a *nomine pæna*; debt lies for the *nomine pæna*, tho' it goes to the heir along with the rent. *Co. L.* 162. b. 1 *Rol.* 595. l. 17.

So, by the *st.* 32 *H.* 8. 37. debt lies by an executor or administrator of any seised of a rent service, charge, or seck, or of a fee-farm rent, in fee, in tail, or for life of another, against him that ought to pay the same, his executor or administrator.

A lease for life, or in tail, rendring rent; it is a rent-service within this statute. *Co. L.* 162. b.

So, it lies against any, who claim under him, that ought to pay, by purchase, devise, or descent. 2 *Ver.* 613. *R.* 1 *Leo.* 302.

So, by the same statute, if a wife seised of a rent, &c. in fee, tail, or for life, dies; her husband shall have debt for the arrears due at her death.

And this, as well for arrears before the coverture, as after. *Co. L.* 162. b.

So, by the *st.* 29 *Car.* 2. 8. which gives remedy for augmentations to vicars, &c. by debt or distress, debt lies upon an augmentation of an annual payment reserved upon a lease for lives, during the continuance of the lives. *R.* 3 *Lev.* 83.

So, now, by the *st.* 8 *Ann.* 14. though a lease for life be continuing, any person having rent due on any lease for life or lives, may bring debt for the same, in the same manner as if due on a lease for years.

Vide Rent, (D 3, &c.)

(A 6.) Debt for an Annuity.

So, if an annuity be granted for years, debt lies for the arrears. *R. Cro. El.* 268. *R. cont. Cro. El.* 3. *Dub. Cro. El.* 895. *Acc.* 1 *Bul.* 151. *D. cont. per Holt.* 5 *Mod.* 143. So,

So, if it be granted for life, or *pur autre vie*; after the estate determined, debt lies for the arrears before. *R. Goldsb. 30.*

So, if the grantee of an annuity in fee leases for years; after the term expired, he shall have debt for the arrears during the term. *1 Rol. 597. l. 10.*

So, if a parson, who has an annuity in right of his church, resigns or is deprived; he shall have debt for the arrears incurred before his resignation or deprivation. *19 H. 6. 41. b. 1 Rol. 595. l. 50.*

So, if the parson dies, his executors shall have it. *4 Co. 49. a.*

So, if a bishop had granted an annuity before the *ft.* *1 El. 19.* confirmed by the dean and chapter, and dies; debt lies against the successor for the arrears at his death. *R. 1 Rol. 592. l. 20.*

(A 7.) *When it does not lie.*] But by common law, debt does not lie for the arrears of a rent or annuity in fee, in tail, or for life, so long as the estate of freehold has continuance. *8 H. 6. 6. b. 1 Rol. 594. l. 55.*

As, if the lord aliens his seignory in fee; debt does not lie for rent of his very tenant in arrear before the alienation. *19 H. 6. 42. b.*

If a lessor, after a lease for life, grants the reversion; debt does not lie for the arrears, before the grant. *1 Rol. 595. l. 35.*

If he enters upon the lessee, and detains until payment; he shall not, during his seizure, have debt for arrears before. *1 Rol. 596. l. 25.*

If a lessee for life leases to *A.* for years, and then surrenders to his lessor upon condition, and *A.* surrenders to him and takes a new lease, and after the condition performed, the lessee for life re-enters, and ousts the lessee for years, who re-enters, he shall not have debt against *A.* for rent upon the first lease, for it was determined. *R. Cro. El. 264.*

So, if a rent or annuity in fee, &c. be demised for years; the lessee shall not have debt during the term. *R. 1 Rol. 595. l. 40. Semb. Cro. El. 895.*

If a lessee for life of a rent, &c. acknowledges a statute, and afterwards releases to the terre-tenant, and then the conusee extends, the conusee shall not have debt for the rent, though his interest is but a chattel; for, as to him, the freehold, out of which it was derived, has continuance. *R. 1 Rol. 596. l. 5.*

So, an executor or administrator shall not have debt upon the *ft.* *32 H. 8. 37.* for the arrears of a rent-charge against the occupier; but it ought to be against the tenant of the land. *Semb. Al. 62.*

Nor, against the issue in tail for arrears incurred in the life of his ancestor. *R. 2 Ver. 613.*

Nor, against the lord by escheat, or tenant in dower, or by the curtesy; for they do not claim merely by the party. *1 Leo. 302, 3.*

[If an annuity is devised to a *feme covert*, on condition that she releases all right and title, &c. and she dies without releasing, debt cannot be maintained for the arrears of the annuity. *Acherley v. Verapen, T. 8 & 9 G. 2. C. B. Fort. 188.*]

(A 8.) Debt upon Contract.

(A 8.) *Express.*] So, debt lies upon every express contract to pay
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a sum certain : as, if a man covenants or grants to pay. *R. 1 Leo. 208.*

[In some instances it is not necessary to prove the exact sum laid in the declaration. *Dougl. 6. 704.*]

So, if a man retains counsel for 40*s. per ann.*; debt lies for the 40*s.* 37 *H. 6. 8. b.*

If he retains an attorney to prosecute a suit for him, *capiendo 3*s.* 4*d.** per term for his fee besides expences; debt lies for his fee. *R. 2 Rol. 76. Vide Attorney, (B 18.)*

So, if a solicitor or a stranger retains him for another. *R. 1 Rol. 593. l. 51. 594. l. 10.*

And it lies against him for whom he was retained, as well as against the retainer. *R. 1 Rol. 593. l. 45.*

So, it lies upon *concessit solvere*, according to the custom of *London, Bristol, &c.* *R. 4 Leo. 105.*

So, if a man pays the debt of *B.* at his request, to be repaid upon request; debt lies for it against *B.*, for it is a manifest contract between them. *R. 1 Rol. 593. l. 25.*

Or, delivers money to *B.* to be repaid at such a day. *1 Rol. 597. l. 50.*

Or, to be safely kept. *1 Rol. 597. l. 51.*

Or, to be *B.*'s money upon such a condition, otherwise to be re-delivered. 41 *Ed. 3. 10.*

Or, to be paid to another; and he does not pay it. *Dy. 20. b.*

Or, to be expended for his use; and he does not expend it. *R. Cro. El. 644.*

So, if money be delivered to *A.* to be paid to *B.*, debt lies by *B.* *R. 2 Rol. 441.*

So, debt lies tho' the contract be by way of a promise executory upon a good consideration; as, upon a promise to pay 100*l.* upon the marriage of *B.* *1 Rol. 593. l. 10.*

A promise to a physician, surgeon, &c. if he makes a cure. *1 Rol. 593. l. 15. 17.*

Upon a promise to a carpenter, labourer, &c. if he builds or repairs an house, way, &c. 37 *H. 6. 9. a.* 17 *Ed. 4. 5. a.*

So, tho' the promise be for the advantage of a stranger: as, if a man promises to pay so much for the education of the child of another. *R. Al. 6.*

If he retains a taylor for 40*s.* to make a garment for his own daughter. 2 *Rol. 77.*

Or, for the servant of his daughter. *R. Cro. El. 880.*

So, it lies, if the sum be not certain, if it may be ascertained: as, upon an agreement to pay the debt of *A.* *R. 2 Jon. 184. Dub. Cro. El. 758.*

To pay a taylor *quantum meruit* for making garments, and finding necessities for them.

[It lies for that defendant bought goods for so much money as they should be worth, with an averment that they were worth so much. *Vaux v. Mainwaring, M. 1 G. Fort. 197.*]

To pay his proportion of the charge of a suit, with an averment that his proportion is so much. *R. 3 Lev. 429.*

To pay so much for the time his son had dieted with him; where the father promised 8*l. per ann.* and died within the year. *Cro. El. 756.*
So,

So, if a man in a tavern has wine, debt lies for it.

(A 9.) *Implied.*] So, debt lies, though there be only an implied contract: as, if a man be found in arrear upon account. 1 *Rol.* 598. l. 47.

Tho' the account be made before auditors,

If a bailiff pays more than he has received, debt lies for the surplus. *R.* 1 *Rol.* 598. l. 51.

So, debt lies for money awarded by an arbitrament. 2 *Sand.* 66. *Vide Arbitrament*, (I 1.)

So, by B. for money paid to A. for the use of B. 1 *Rol.* 597. l. 55. *Yel.* 23.

Tho' paid there for his use without his command. *Semb. cont.* 1 *Rol.* 597. l. 25.

So, debt lies for a *nomine pœnzæ*. 1 *Leo.* 110.

So, debt lies for the penalty of a bye-law, though it be not said by what action it shall be recovered. *R.* 1 *Rol.* 599. l. 25.

So, if by custom in a borough, the burgessees prescribe to choose a person to collect the lord's rents, and to pay 20 s. *per ann.* for the profits of a market; debt lies by the lord for the 20 s. 1 *Rol.* 595. l. 20. 597. l. 5.

So, debt lies for a fine, due by custom for a pound-breach. 11 *H.* 7. 14. a. *Hard.* 486.

So, for customs due for merchandize, tho' the goods are forfeited for non-payment. *R.* 1 *Rol.* 383.

So, for toll due by custom. *Hard.* 486.

So, for bar-fee due to a gaoler. *Ibid.*

So, for every duty created by the common law, or by custom. *Per Hale*, *Hard.* 486.

So, debt lies for a pain or amercement in a court-baron. 2 *Sand.* 66. *R.* 1 *Leo.* 203. *Dub. Carth.* 184.

So, for a fine assessed by a steward in a court-leet. *R. Cro. El.* 581. *Vide Leet*, (O 11.)

So, for a fine upon an admittance to a copyhold. 1 *Sid.* 52. 2 *Mod.* 230. 3 *Mod.* 240. *Adm. Hard.* 487. *Vide Copyhold*, (H 6.) [*Vide Doug* 722—732.]

So, for a fine imposed for the refusal of an office. *R.* 3 *Lev.* 116.

So, for the profits of courts, reserved to the lord upon a grant of the manor. *Mo.* 870.

So, debt lies against a sheriff for money levied by him upon a *fieri facias*; for the law creates a contract for his paying. *R.* 1 *Rol.* 598. l. 10.

Tho' the writ be not returned. *R.* 1 *Rol.* 598. l. 15.

So, debt lies upon any statute, which gives an advantage to another, for the recovery of it: as, upon the *st.* 32 *H.* 8. 1. for money devised to be paid out of land. *Per Holt*, *Mod. Ca.* 26. *Vide ante*, (A 1.) *Vide Action upon Statute*, (E 1, &c.)

For fees given by statute to a sheriff. *R. Mo.* 853.

For fees upon the execution of an *elegit*. 1 *Sal.* 209.

Vide Bye-law, (D 1.)

(B) When Debt does not lie.

BUT debt does not regularly lie for a thing fallen, of which there is an estate of inheritance or freehold continuing: as, for arrears of rent, or annuity in fee, in tail, or for life. 4 Co. 49. *Vide ante*, (A 7.)

So, debt does not lie by the lord, for a relief. Co. L. 47. b.

Nor, for escuage. *Ibid.*

Nor, for *aide pur faire fitz chivaler ou file marrier*. *Ibid.*

So, debt does not lie for the arrears of a rent in fee, in tail, &c. tho' the estate be determined by act in law: as if rent be in arrear, and then the tenancy descends to the lord. 4 Co. 49. a. *Vide ante*, (A 7.)

And it did not lie by an executor or administrator, where his testator or intestate could not have it, until the *fl.* 32 H. 8. 37. 4 Co. 49. a.

So, debt does not lie upon a judgment, recognizance, &c. when the party has chosen another remedy. *Vide ante*, (A 2, 3.)

So, debt does not lie upon an agreement by way of promise, where the consideration was executed: as to pay so much for service done, &c. 1 Rol. 594. l. 25. *Vide Action upon the Case upon Assumpsit*, (F 6.)

Tho' it was executed at his request: as, if in consideration of goods sold to A. at his request, he promises to pay if A. does not pay; debt does not lie, but *assumpsit*, for the contract was by the sale, to which he was not a party; and his request, without more, does not make him debtor. R. 1 Rol. 594. l. 30. *Hurd.* 486.

So, if he makes such promise immediately after the sale; for it founds in covenant. 1 Rol. 594. l. 35.

So, if he promises A. to pay him 10 s. *per* week, if he will serve his aunt; debt does not lie, for the service was not to himself; and so there wants a *quid pro quo*. *Dy.* 272. *in marg.*

So, if a man be at a common inn, debt does not lie for diet of him, his servants or horses, without some price agreed, or some contract. 3 *Leo.* 161.

So, if a man undertakes, that if A. will release his debt to B. he himself will be his debtor; debt does not lie. 9 H. 5. 14.

If a man demises for years, if a life so long lives, (without saying what life, which is uncertain and void,) at such a rent; debt does not lie for the rent as a sum certain due by covenant. *Skin.* 570.

So, if the property be not altered by the bailment, debt does not lie: as, if a man delivers money to B. in a bag unsealed, he cannot have debt for it. 1 Rol. 597. l. 20.

So, debt does not lie upon an abitrament for a collateral thing awarded. R. 1 Rol. 591. l. 32.

So, debt does not lie for arrearages found upon an account, where account does not lie for such thing. 1 Rol. 599. l. 2. 5.

So, debt does not lie for the surplus, where a receiver pays more than he received; for he shall not have allowance as a bailiff. R. 1 Rol. 599. l. 20.

So, debt does not lie for the interest of money due upon a loan; but he ought to have *assumpsit*. R. 1 *Vent.* 198. [*Harries v. Jamieson*, B. R. L. 34 *Geo.* 3. 5 T. R. 553., *Semb. contra.*]

So,

So, debt does not lie upon an agreement to pay first-fruits to the bishop; for it is not within the consueance of the temporal courts. *Co. L. 162. b.*

So, debt does not lie upon a bill of exchange against the acceptor; for the acceptance binds him by the custom of merchants, but does not raise a duty. *R. Hard. 485.*

So, it does not lie upon a note to pay, without a consideration; tho' alleged that it binds by custom. *R. Skin. 398.*

[But if a *mutuatus* be laid with it, it lies. *Sed* 2. How to enter judgment on it? *Wells v. Craig, H. 12 G. Str. 680.*]

So, debt does not lie for any part of a debt upon an intire contract: as, if a man by deed promises to pay 100*l.* *per ann.* to *A.* for collecting his rents, and dies after three quarters of a year expired, and within the year; debt does not lie by *A.* for 75*l.* for his salary for the three quarters of a year. *R. 1 Sal. 65. Vide post. (C 1.)*

Vide ante, (A 2, 3. 7.)

(C) By whom Debt lies.

IN cases where debt lies, it is maintainable by the party to the contract, his executor, or administrator. *By whom covenant lies, vide Covenant, (B 1, &c.)*

So, sometimes the executor or administrator, may have debt, where his testator could not have it: as, by the *st. 32 H. 8. 37.* by the executor, or administrator, of a man seised of a rent, fee-farm, &c. for arrears due at his death. *Vide ante, (A 5.)*

So, by the executor or administrator of the lord, for a relief due at his death. *Co. L. 162. b. 11 H. 6. 15. a.*

Or, for escuage; for it is a fruit fallen, and goes to the executor.

So, for *aide*, due at his death, *pur faire fitz chivaler ou file marrier.* *1 Rol. 596. l. 50.*

So, debt lies by him, who is privy in estate: as, upon a lease for years by *B.* debt lies by his heir for rent due after the death of his ancestor. *1 Rol. 591. l. 47. 5 H. 7. 19. a.*

So, debt lies by an assignee of a reversion for rent incurred after attornment. *Co. L. 310. 1 Rol. 591. l. 45.* and this, by the common law, without the aid of the *st. 32 H. 8. 34. 4 Mod. 81.*

So, by an assignee of part of the reversion for his proportion. *Adm. Cro. El. 637. 651.*

So, by a grantee of rent, if the lessee attorns. *Semb. 1 Lev. 22.*

So, by the devisee of a reversion; for the rent is incident to the reversion. *R. 5 H. 7. 19. a. Skin. 367.*

So, if a devise be of a reversion of lands *in capite*, which is void for a third part by the *st. 32 & 34 H. 8.* it lies by the devisee for two third parts of the rent. *R. Cro. El. 851. Vide ante (B).*

So, if a devise be of a moiety of a rent, without the reversion, to three sons to be divided; debt lies by each son for his share of the rent. *Per three J. Poph. cont. Cro. El. 637. 651. Vide Suspension.*

So, by a devisee of a reversion against an assignee of a term, after assignment of the reversion, for arrears due before assignment. *R. Skin. 367.*

So, if lessee for years assigns all his term to *B.* rendring rent; debt lies by the lessee for the rent, *as such*, for it is not a sum in gross; tho'

tho' no reversion remains in the lessee. *R. Carth. 161. Vide post. (E).*

So, against the assignee of *B. Carth. 162.*

So, if *A.* the lessee, surrenders, rendring rent, he shall have debt for the rent, *as such*, for it is not a sum in gross. *Carth. 162. in marg.*

So, debt for rent, reserved upon a demise, lies by the lord, who has the reversion by escheat. *Adm. 5 H. 7. 19. a. 3 Co. 22. b.*

So, if a reversion be granted in *mortmain*, debt lies for the rent by the lord, who entred for the alienation in *mortmain.* *5 H. 7. 19. a.*

So, by the lord, who claims the reversion by the purchase of his villein. *Ibid.*

So, debt lies by the assignee of a reversion, after the term expired, for rent due at the end of the term. *R. 2 Cro. 117.*

So, by an executor of an administrator, who being possessed of a term for 100 years, made a lease for five years, for rent due before the death of the administrator; tho' the interest in the residue of the term belongs to the administrator *de bonis non*, &c. *R. 2 Lev. 100.*

(D) By whom not.

BUT if a lessee assigns his term, debt does not lie by the lessor, against the executor of the lessee, for rent due after the assignment. *R. 3 Co. 24. a. Cro. El. 556. Poph. 121. but R. cont. 1 Sid. 266. 2 Vent. 209. Vide post. (E).*

So, if the lessor grants his reversion to another, he shall not have debt for rent due after his grant; for the rent is incident to the reversion. *3 Co. 22. b. 23. a. b.*

So, a grantee of a reversion shall not have debt against the lessee for rent due after assignment to the term of another. *R. Poph. 55.*

So, if the grantee of a rent, when the rent is in arrear, assigns his rent, and dies; his executor shall not have debt for the arrears by the *ft. 32 H. 8. 37.* for by the assignment, his testator himself had lost his arrears. *4 Co. 50. b.*

(E) Against whom Debt lies.

SO, debt is maintainable against the party to a contract, his executor, or administrator. *Dy. 4. b. Against whom covenant lies, vide Covenant, (C 1, &c.)*

As, if a lessee assigns his term, the lessor himself may have debt for rent due after the assignment, if he will; for the privity of contract continues, and the lessor need not relinquish the lessee, and resort to the assignee *nolens volens*, when perhaps the assignee is not responsible. *R. 3 Co. 23.*

So, if the executor or administrator of the lessee assigns the term, debt lies against him for rent due after the assignment. *R. cont. 3 Co. 24. a. Cro. El. 555. Poph. 120. Semb. cont. Cro. El. 715. Mo. 600. Dub. Latch, 260. R. acc. 1 Sid. 266. R. acc. 2 Vent. 209. 4 Mod. 326. 1 Lev. 127.*

So, if the lessee himself assigns, debt lies against his executor or administrator, if he has assets. *Cont. 3 Co. 24. a. Dub. Latch, 260. R. acc. 1 S. d. 266. 2 Vent. 209.*

So, if the lessee assigns part of the land, a grantee of the reversion shall

shall have debt against the lessee for the whole rent; for the privity continues, where he has assigned only part of the land demised. *R. 3 Co. 24. a. Cro. El. 633.*

So, if the executor of a lessee assigns part of the land, the lessor may have an action against the executor for the whole rent due after the assignment. *R. Lit. 53.*

If the lessee assigns part of the land to *A.* who enfeoffs *B.*, yet debt lies against the lessee. *Semb. Dy. 4. b.*

So, if the lessee himself makes a feoffment. *R. Dy. 4. b. in marg.*

So, if the lessee gives an obligation with condition for payment of the rent, debt lies by the lessor, upon the obligation, after assignment of the term, and acceptance of rent from the assignee. *Cro. Car. 188.*

So, debt lies against the executor or administrator of the assignee, tho' the executor waives the possession; for if he be executor, he cannot waive in part. *R. 2 Rol. 132.*

So, if the lessee assigns his term, the lessor, if he will, shall maintain debt against the assignee. *2. Dy. 247, 8.*

So, if the lessee assigns a moiety of the land for the whole term; the lessor, if he will, may maintain debt against the assignee for a moiety of the rent. *R. 2 Lev. 231.*

Or, a joint action against the lessee and assignee. *D. 2 Cro. 411.*

So, if the lessee assigns his term, rendring rent to him; though the whole of the term be assigned, debt lies by the assignor upon the contract, against the assignee, his executor or administrator. *Adm. 2 Mod. 175. Vide ante (C).*

Vide Chancery (2 Z).

(F) Against whom, not.

BUT if a lessee assigns his term, and the lessor accepts rent from the assignee; debt does not lie afterwards against the lessee, his executor, or administrator, for he may plead in bar, such assignment and acceptance of rent by the lessor. *R. 3 Co. 24. b. Cro. El. 715. Mo. 600. R. 2 Cro. 334. 2 Bul. 151.*

So, if an executor or administrator of a term assigns it, and the lessor accepts the rent from the assignee. *3 Co. 24. Cro. El. 715. Mo. 600.*

So, tho' it does not appear that the lessor had notice of the assignment, at the time of the acceptance of the rent; for it shall be intended till it appears to the contrary. *R. 2 Cro. 334.*

So, if the lessor accepts any part of the rent. *Semb. 1 Lev. 308.*

So, if a lease be of tithes, rendring rent, and the lessee assigns, and the lessor accepts rent from the assignee; tho' rent does not issue out of tithes. *Dub. 1 Lev. 308.*

So, if the assignee of a term assigns over to another; debt does not lie against the first assignee, for rent due after his assignment, tho' no notice of the assignment or acceptance of rent be alleged; for the privity is gone by his assignment. *R. per two J. cont. but Powell acc. in C. B. but this judgment was reversed in B. R. 3 Lev. 295. 2 Vent. 234. 1 Sal. 81. Carth. 177. 4 Mod. 71. R. cont. per two J. Twissd. acc. 1 Sid. 338, 9. Ray. 162.*

[If the assignee of a term assigns it over to a beggar, a prisoner, it

is not fraud, and he is discharged of the rent. *Lekeux v. Nasb*, H. 18 G. 2. *Str.* 1221.]

So, if a lessee assigns his whole term to the lessor, rendring rent; debt does not lie against the executor of the lessor, for the assignment amounts to a surrender, and therefore no remedy after the death of the lessor; but in equity. *R. 2 Mod.* 175.

(G) Debt to the King.

(G 1.) By what Means accrued.

IF a man gives an obligation, recognizance, &c. to the king, he becomes indebted to the king.

[A bond taken in the name of the crown, by the cashier of the exchequer, from a man as security for the banker with whom he entrusts the crown's money, is good. *Rex v. Yale*, in *Sc. H.* 1719, *Bunb.* 58.]

So, every person, who by any means is chargeable to the king, shall be debtor to the king; for it shall be taken *extensivè*: as, where he is answerable to the king for debt, damage, duty, rent-arrear, &c. *Godb.* 295.

[Land-tax money in the hands of the collector is a debt to the king. *Brassiey v. Dawson*, T. 7 G. 2. *Str.* 978.]

So, if a man gives an obligation to the king, for performance of covenants; when those are broken, he is a debtor to the king. *R. 7 Co.* 20. b. *Sir Tho. Cecil.*

Or, gives an obligation to another, which is assigned to the king. *Vide Assignment (D).*

So, if a man indebted upon a judgment in debt, trespass, &c. acknowledges a recognizance to the king, without cause, upon covin to avoid the imprisonment at the suit of his creditors, and to be turned over to the *Fleet*; tho' by the *st.* 1 *R.* 2. 12. he shall be remanded to his first prison, till he has made gree with his creditors; yet after such gree, he shall return to the *Fleet*, and there abide till he has satisfied his recognizance confessed. 4 *Inst.* 111.

So, before the *st.* 33 *H.* 8. 39. an obligation to another, to the use of the king, made the obligor debtor to the king.

But now, by that act, all obligations or specialties made to the use of the king or his heirs, or for any cause touching the king or his heirs, shall be made to the king *heredibus vel executoribus suis*, and to no other to his use: and if any take or make obligation, &c. otherwise, he shall suffer imprisonment at the discretion of the king or his council: and if not contented in the king's lifetime, they shall remain and be to the heirs or executors of the king at his free disposition, assignment, or appointment.

And by the *st.* 7 *Jac.* 15. no debt shall be assigned to the king, which was not originally due to his debtor, or accountant. *Vide post.* (G 15.)

By the course of the *Exchequer*, confirmed by the *st.* 8 & 9 *W.* 3. 28. a teller of receipt in the *Exchequer*, into whose office any money by way of loan, advance, or for tax, &c. shall be paid, shall without delay weigh, and enter the weight and tale according to the antient course, and throw down a bill or bills for the same, in parchment signed by himself, into the tally-court, as soon as the officers be there, whereby a tally may be levied, &c. and the teller plainly charged.

So,

So, estreats (*extraſta*) are made out of *Chancery*, *B. R. C. B. iters*, &c. of fines, amerciaments, &c. in thoſe courts; upon which ſummonſes of the *Exchequer* iſſue for levying thoſe debts. *Mad.* 707, 8.

So, if a man takes the king's goods, he is accountable for them to the king. 11 *Co.* 90. *Vide Accompt*, (A 1.)

So, if he takes broken ordnance, &c. by colour of his office, as fees, claiming them to his own uſe; he ſhall be accountable to the king. 11 *Co.* 90. 2 *Rol.* 161. l. 15.

So, if he takes by colour of a warrant, for his fees or expences, when the warrant is not lawful. *R.* 11 *Co.* 92. 2 *Rol.* 161. l. 20. *Cro El.* 545.

Or, the king may charge him, who made the illegal warrant, at his election. 11 *Co.* 92. b. 2 *Rol.* 161. l. 25.

So, if an officer has an obligation to the king, and delivers it to his ſervant, to be tranſmitted to him who has the cuſtody of the obligations, and the ſervant cancels, or embezzles it, his maſter is liable. *Godb.* 296. *Dy.* 161. 2 *Rol.* 156. l. 15.

So, if he pays money out of the *Exchequer*, without a grant or authority under the great ſeal, or privy ſeal, or by virtue of an act of parliament. *By the* 11. 8 & 9 *W.* 3. 28. f. 6.

So, if a man enters by wrong, and takes the profits of the king's land, he ſhall be accountable for the profits. 2 *Rol.* 161. l. 12. *Vide Accompt*, (A 1.)

Or, takes goods deviſed to the king before they come to his hands; for the law does not put him to his action of treſpaſs. 2 *Rol.* 161. l. 17.

So, if ſeveral be joint-accountants to the king; each ſhall answer for the whole to the king; and not only for ſo much as he has received. *Hard.* 314.

But if a man receives the king's money, not knowing it to be ſo, he ſhall not be chargeable: as, if an officer purchaſes land, and pays the king's money in his hands for it; the vendor, if he be not conſtant of it, ſhall not be charged for it. *R. Cro. El.* 545.

So, an obligation to the king, if it be not to him, his executors or ſucceſſors, is not within the ſt. 33 *H.* 8. 39. *Mo.* 193.

(G 2.) By what Means ſatisfied.

(G 2.) *By the body of the debtor.*] By the ſt. 33 *H.* 8. 39. obligations, &c. concerning the king, ſhall be of the ſame force and effect as a ſtatute-ſtaple.—So, by the ſt. 13 *El.* 4. debts due by any accountant, &c. *Vide Execution*, (B 3.)

By common law, the body, goods, and lands of a debtor, or accountant to the king, were liable for the debt. 3 *Co.* 12. b. 2 *Inſt.* 19. *Godb.* 290. 2 *Rol.* 295.

(G 3.) *By his goods.*] All the goods and chattels of the debtor are liable to ſatisfy the king's debt.

And if his debtor dies, the king may command the goods of the deceased to be ſeized till ſatisfaction. 2 *Rol.* 158. l. 41. *Vide the* ſt. 9 *H.* 3. 18. *Mad.* 663. 665.

And he may take ſecurity of the executor for payment, before he be allowed to adminiſter. 2 *Rol.* 158. l. 45.

So,

So, he may seize *bona ecclesiastica*, if the debtor be a clerk. 2 *Rol.* 158. l. 40.

If the king's debtor becomes *felo de se*, the debt shall be paid before the goods be disposed of by the almoner. *Sav.* 60.

But things necessary *pro victu* of him and his family shall not be seized. 2 *Rol.* 160. l. 5.

Nor, *averia caruce*, if there be other chattels sufficient. 2 *Rol.* 160. l. 5. And this, by the *ft. Art. sup. Chart.* 12. 2 *Inst.* 132. 565.

Nor, the horses, or arms of a knight. 2 *Rol.* 160. l. 5.

(G 4.) *Or lands.*] So, all the lands and tenements of the debtor are liable to be extended for the king's debt, which he has, or of which he is seized. *Godb.* 294, 5. which he has at the time of the assignment, where the debt is assigned to the king. *Hard.* 24. *Pl. Com.* 321.

Though the king afterwards releases all his right to the terre-tenant; for he is chargeable in respect of his person. 2 *Rol.* 160. l. 40.

So, a reversion, when it comes into possession. *Sav.* 34, 5.

So, all the lands of a conusor, &c. are chargeable upon a debt assigned to the king; though only a moiety was before. *Sav.* 133.

So, lands purchased by covin with the king's money. 2 *Rol.* 160. l. 20.

And by the *ft.* 13 *El.* 4. if any accountant, who shall receive, or be chargeable with any money of the queen, shall be found in arrear, and do not pay in six months, the queen by letters patent may make sale of so much of his lands as will satisfy the debt. And this act is intended by the *ft.* 14 *El.* 7. to under-collectors, &c. and by the *ft.* 1 *Jac.* 25. made perpetual.

And by the *ft.* 27 *El.* 3. the sale may be after the death of an accountant for the receipt of money, and if the account be settled within eight years after his death, as well as if it was in his lifetime, if the accountant had not a *quietus* in his lifetime: provided no sale be made during the nonage of the heir.

So, lands in trust for him, or of which he has a power of revocation, though settled *bonâ fide*. *R. Godb.* 290. *Hard.* 24. 2 *Rol.* 295, &c.

Tho' the settlement, with power of revocation, was made before he become accountant to the king. *R. Godb.* 290.

(G 5.) *In the hands of the heir.*] So, the king may seize the lands of his debtor upon his death.

And may resort to the heir, tho' the executor has assets. *Cont. Dy.* 67. b. in marg.

And by the *ft.* 33 *H.* 8. 39. all lands, &c. which come by descent to the heir, in fee, or in general or special tail, or by gift of his ancestor, shall be chargeable for a debt to the king, by a judgment, recognizance, obligation, or specialty of his ancestor.

And though the word *heirs* be not comprized in such specialty.— Otherwise, where an obligation is assigned to the king. *R. Sav.* 2.

And therefore, though lands of the issue in tail were not chargeable before, they are now chargeable, as well as lands which descend in

in fee, for the debt of his ancestor by judgment, recognizance, obligation, or other specialty. *R. 7 Co. 21.*

So, lands of the heir, by the gift of his ancestor, before or after the ancestor was bound to the king, shall be charged. *7 Co. 19. a.*

But lands are not chargeable in the hands of the issue in tail, for a forfeiture or other debt to the king, except by judgment, recognizance, obligation, or specialty. *R. 7 Co. 21. b.*

Nor, for a debt to the king by judgment, &c. if the issue aliens *bonâ fide* before extent or process against him. *Ibid.*

Nor, for a debt to the king by judgment, recognizance, &c. if it was originally made to a subject, and afterwards came to the king by attainder, forfeiture, assignment, &c. *R. 7 Co. 22. a.*

So, by the *st. 33 H. 8. 39.* the king may, at his liberty, recover his debt against the executor or administrator, if he has assets.

And by *st. M. Ch. 9 H. 3. 8.* and by the process since the *st. 33 H. 8. 39.* if it appears to the sheriff that the goods of the debtor are sufficient for the king's debt, the sheriff ought not to extend the lands. *2 Inst. 14. Mad. 667.*

[Wherever an *extent* might have issued in a man's life, a *diem clausit extremum* may issue against his estate after his death. *Rex v. Michener, M. 1722, Bunb. 118.*]

[*Diem clausit extremum* may issue against the estate of simple contract debtor on commission, though he was not the king's debtor by record at his death. *R. v. Curtis, P. 23 G. 2. Parker, 95.*]

(G 6.) *In the hands of a stranger.*] So, if the debtor dies without heir or executor, process shall go against the terre-tenants. *2 Rol. 162. l. 15. Vide post. (G 10.)*

So, if the debtor aliens his land, and then dies without heir, execution shall be against the terre-tenants. *2 Rol. 156. l. 50. Godb. 292.*

So, if he aliens his goods, and dies without executor, process shall be against the possessors of the goods. *2 Rol. 156. l. ult.*

If a lord of a manor forfeits his issues for not serving upon a jury, they may be levied upon the lands of the copyholders, lessees for life, or years; for it is an inherent charge upon the land. *2 Rol. 157. l. 45. Vide post. (G 10.)*

So, if a debtor to the king aliens his lands after the obligation, &c. made, or after he becomes an officer in which respect he is accountable; they are chargeable, for it relates to the time of the debt, office, &c. *Vide post. (G 9.)*

[But goods pawned or pledged before the teste of an extent are not liable. *R. v. Cotton, T. 24 & 25 G. 2. Parker, 112.*]

So, by the *st. 13 El. 4.* if any accountant, or indebted, &c. purchases lands in the name of any other, for his own use or profit, the same shall be liable to such debt, &c. in the same manner as if the debtor himself was seised, &c.

So, if the debtor takes a term for years to him and his wife, it shall be taken in execution in the hands of the wife after the death of the husband. *8 Co. 171.*

So, a purchaser of lands, &c. after a judgment, obligation, or specialty to the king, shall be charged for the king's debt. *Sav. 60.*

So, a purchaser after assignment, where a debt is assigned to the king.

But if, after a recognizance to the king, the consuror be attainted for treason, a *scire facias* does not lie upon the recognizance against the king's patentee. *Sav. 60.*

By the course of the *Exchequer*, process does not go against a purchaser, if the executor, or heir, has assets. *Dy. 67. b. in marg.*

And by the *stat. 33 H. 8. 49. lands, &c.* in the seisin or possession of divers, other than the obligor, shall be intirely chargeable, and not severally.

[Postmaster appointed for three years, gives bond for three years, at the three years end he is indebted 9*l.*, afterwards he mortgages an estate, and the mortgagee has possession on ejectionment; he is continued postmaster without new appointment or bond, and becomes indebted 72*l.* His bond shall extend to that, and the estate mortgaged be liable to an extent. *Williams v. Jones, M. 1729, Bunb. 275.*]

(G 7.) *By the goods of a stranger.*] So, upon an execution for the king's debt, the goods of a stranger *levant and couchant* upon the land of the debtor, may be taken. *2 Rol. 159. l. 30.*

So, the cattle of a stranger which the debtor suffers to manure his land. *2 Rol. 159. l. 42.*

So, for rent due to the king, the goods of a stranger may be distrained. *Godb. 295.*

So, a debt due to the king's debtor shall be extended for the king's debt. *21 H. 7. 12. 16. Godb. 291.*

Tho' due upon simple contract. *Godb. 296.*

[If on an extent against *A.* the king's debtor, the inquisition finds that *B.* is indebted to him; on return of inquisition, and affidavit that the money in *B.*'s hands is in danger, an immediate extent shall issue against *B.* (*Rex v. Gibbons, T. 1718, Bunb. 24.*) even though there is reason to suppose that *A.* became so with intent to strip the rest of *B.*'s creditors. *Rex v. Taylor, P. 1723, Bunb. 127.*]

[Upon an extent in aid, debts without specialty cannot be found without motion. *Rex v. Packington, P. 1719, Bunb. 42.*]

[Simple contract debt may be found and seized to the third degree, but not beyond it. *Erwin's Case, M. 30 C. 2. Parker, 259.*]

[If it be found by inquisition against a receiver-general, that he has paid over money to *A.*, an immediate extent may issue against *A.* *Rex v. Taylor, P. 1723, Bunb. 127.*]

[So, in the case of an under-treasurer of the ordnance. *Rex v. Enderupp, M. 1723, Bunb. 134. Bradley v. Bowling, H. 1725.*]

[An extent in aid being prerogative process is always under the care of the court of Exchequer, and they have a discretionary power over their own rules. *Per cur. Ibid.*]

[Where many small debts are found on an inquisition, on an extent against the king's debtor, instead of separate extents against each separate debtor, the court may order a receiver to collect them, and pay to the deputy remembrancer. *Rex v. Allen, M. 1730, Bunb. 293.*]

[Debts to the king's debtor are not bound till the teste of the inquisition. *Attorney-General v. Elwell, T. 1725, Bunb. 199.*]

[Debts to the king's debtor are not bound by the teste of the extent, but only from the caption of the inquisition. *Rex v. Green, P. 1729, Bunb. 265.*]

But

But the goods of a stranger taken for the king's debt, cannot be sold as the goods of the debtor himself may. *Semb. 2 Rol. 159. l. 35. R. Cro. El. 431.*

So, if land be extended upon a recognizance to *A.* at 20 *l. per ann.* which was of the real value of 60 *l. per ann.*, and the conusor is bound by recognizance to *B.* who is outlawed; the king shall not take the surplus above 20 *l. per ann.* tho' it be found by inquisition that the land was of such value. *R. per two J. Clark cont. Cro. El. 266.*

So, if a joint-tenant, or tenant in common, be a debtor to the king; the goods of his companion cannot be taken, tho' they be *levant* and *couchant* upon the whole land. *2 Rol. 159. l. 40. Vide post. (G 10. 15.)*

[On importation and entry by one partner only, if by mistake the whole duties are not paid, each of the partners is liable in the whole deficiency to the crown; tho' ten years afterwards, and five years after the importer was bankrupt. *Attorney-General v. Stanyforth, H. 1721, Bunb. 97. Attorney-General v. Burges, M. 1726, Bunb. 223. Attorney-General v. Carbold, H. 1732, Ibid.*]

[So, in debt for non-payment of duties. *Attorney-General v. Weeks, M. 1726, Bunb. 223.*]

Nor, the goods of a testator or intestate, if the debtor takes the executrix or administratrix to wife. *2 Rol. 159. l. 50.*

Or, if the debtor be made executor to another. *Godb. 296.*

[So, a woman shall not be distrained for the king's debt, in her dower, if the heir has sufficient. *Mad. 667.*]

[A debt due to a man *jure uxoris*, is considered as a debt originally due to him, within the meaning of 7 *J. 1. c. 15. R. v. Thornton, H. 7 Ann. Parker, 271.*]

By the *st. 33 H. 8. 39.* in all suits on specialty to the king, he shall recover his costs and damages. *Vide Damages, (A 3.)*

[If an officer of the revenue appoints another to act under him, who being in arrear applies to the principal for money, who pays the whole debt to the crown, and takes a bond for it from the deputy to himself, he shall not have an extent in aid; tho' generally a debtor of the crown shall have crown process to reimburse himself, tho' the crown debt is paid. *Rex v. Clark, M. 1726, Bunb. 221.*]

[Extent in aid shall not issue, but for a debt originally due to the crown's debtor; so if *A.* is indebted to *B.* who assigns to *C.* before the extent issues against *C.* an extent obtained against *A.* shall be discharged. *Rex v. Bowling, M. 1726, Bunb. 225.*]

[If an extent finds a debt due from a merchant, and it does not appear that this was the crown's money; an extent in aid shall not go. *N. B.* The affidavit did not go far enough, and was not in the old form. *Rex v. Jans, P. 1731, Bunb. 300.*]

[No *diem clausit extremum* can issue against one who was not debtor to the king, or found in his lifetime, to be debtor to the king's debtor. *R. v. Boon, P. 16 G. 2. Parker, 16.*]

(G 8.) The King shall be preferred.

The king by his prerogative shall be preferred before any other creditor in an execution for his debt. *2 Inst. 32. By M. Ch. 9 H. 3. 18. and the st. 33 H. 8. 39. Godb. 290. Hard. 24. Mad. 662.*

And

And therefore, if the king's debtor be sued in *C. B.* it may be superseded by a writ of privilege, reciting that the king ought to be paid before other creditors. 2 *Rol.* 159. l. 10.

So, if *A.* be taken upon a *capias*, at the suit of *B.* and afterwards (before the return of the *capias*) a writ issues for the king's debt, with a *teste* before the taking of *A.* he shall be in execution at the suit of the king, as well as for *B.* 2 *Rol.* 158. l. 25.

So, if the goods of *A.* and his lands are seized by extent upon a statute-staple, at the suit of *B.* and after the day of the return, but before an actual return, and before a *liberate*, a writ issues to the sheriff for the king's debt, it shall be preferred. 2 *Rol.* 158. l. 15. *R. Dy.* 67. b.

[If goods are levied by virtue of a *feri facias*, three days before the *teste* of the extent, yet that shall be no bar to the crown: and if the sheriff makes that return on the extent, the court will order him to amend it. *Rex v. Peck*, T. 1716, in *Sc. Bunb.* 8. (Sed *Q.* if the goods were sold.)]

[If a commission of bankrupt issues, and assignment is made, and the assignees seize part of the goods on the 31st, and an extent for a debt to the crown on bonds, some forfeited, some not, issues, tested the same day; the extent shall have the preference, and the court will not on motion order an account of what was due at the time. *Rex v. Earl*, H. 1718, *Bunb.* 33.]

[If a bankrupt, against whom there is an extent for a debt to the crown, has promised that he will also pay a debt of his father deceased to the crown; the assignees shall pay both debts, to have the extent discharged. *Rex v. Lacy*, P. 1734, *Bunb.* 337.]

[Extent against the king's debtor, tested after a distress taken for rent, with notice to the tenant, and appraisement made, but before sale, shall prevail against the distress. *Rex v. Cotton*, T. 24 & 25 G. 2. *Parker*, 112. 2 *Vesey*, 288.]

[But not if the goods distrained had been sold before the *teste*. *Ibid.*]

[If corn is distrained for rent, and extent issues after, but tested before, it shall be preferred, for it binds from the *teste*. *Rex v. Wynn*, P. 1719, *Bunb.* 39.]

[If after extent, inquisition, and seizure of goods, and defendant's bankruptcy, other goods are discovered, the court will quash the extent, &c. and grant new extent of the same. *Teste* with the former. *Rex v. Buchanan*, T. 27 & 28 G. 2. *Parker*, 176.]

[Or, if a second extent had issued after assignment under the bankruptcy, the court would quash it and grant new extent of same *teste*. *Rex v. Gibson*, H. 17 G. 2. *Parker*, 35.]

So, by the common law, the king's debtor had protection, that he should not be sued by other creditors until the king's debt was paid: But now, by the *stat.* 25 *Ed.* 3. 19. other creditors may sue to judgment, but execution shall stay till gree for the king's debt; and then they shall have execution for what is paid to the king, and their own debt. *Godb.* 290.

But by the *stat.* 33 *H.* 8. 39. suit or process for the king's debt shall be preferred before other persons, so always as that the king's suit be commenced, or process awarded, before judgment for the said other persons.

And therefore, if execution be upon a judgment against the king's debtor,

debtor, and before a *venditioni exponas*, an extent comes at the king's suit, those goods cannot be taken upon the extent. *R. 3 Mod. 236. R. Hard. 27.*

[A judgment recovered by a subject, though not completely executed, shall be preferred to the king's extent, sued out posterior to the judgment. *Uppom v. Somner, C. P. H. 19 Geo. 3. 2 Bl. 1251. 1294.*]

[If goods be taken in execution on a *feri facias* against the king's debtor, and before they are sold an extent comes at the king's suit, grounded on a bond debt, tested after the delivery of the *feri facias*, these goods cannot be taken upon the extent. *Rorke v. Dayrell, B. R. M. 32 Geo. 3. 4 T. R. 402.*]

[Precedent judgment on bond shall be preferred to the king's; subsequent, not. *R. v. Dickenson, P. 4 W. & M. Parker, 262.*]

[If executor pleads precedent judgment and subsequent judgment in one intire plea, judgment is against him. *Ibid.*]

So, the king shall not be preferred, where a debt is assigned to him after the death of the debtor. *R. 2 Rol. 159. l. 15. 1 Brow. 37.*

So, tho' a man be in execution for the king's debt, he may be charged also in execution at the suit of a common person. *2 Rol. 158. l. 30. Cro. Car. 390.*

And if he be first in execution for the king's debt, though he may be charged also in execution by a common person, it does not take effect till the king's debt be satisfied. *Godb. 298.*

[On a distress for rent made six days before the *teste* of an extent, the court refused an attachment, though the goods were not sold. *Rex v. Dale, P. 1719, Bunb. 42.*]

[Simple contract debt seized into the king's hands, is to be preferred to bonds not paid before seizure; but payment of bonds by administrator before seizure or notice may be pleaded. *R. v. Allanson, M. 3 & 4 Jac. 2. Parker, 260.*]

[Immediate extent finding the same goods shall be preferred and paid before former extents in aid. Immediate extents take place according to the *teste*. *R. v. Quash, T. 12 Ann. Parker, 281.*]

[And this even if the goods are sold, and return that sheriff has the money, but not if delivered. *Rex v. Bewdage, M. 4 G. 1. Parker, 282.*]

(G 9.) How Execution for the King relates.

[An extent cannot be antedated. *Rex v. Mann, P. 1724; Rex v. Vanderplank, T. 1726; Bunb. 164. Str. 749.*]

If an execution be sued upon land, for the king's debt, upon an obligation, &c. this being in nature of a statute-staple, the execution upon it relates to the time of the obligation, &c. given, and all the lands which the party had at that time shall be chargeable. *2 Rol. 156. l. 25.*

Tho' he had aliened them before the action commenced against him. *2 Rol. 156. l. 25.*

So, if a debt be assigned to the king, execution upon it relates to the time of the assignment. *Hard. 24. R. Sav. 11.*

So, by the *stat. 13 El. 4. lands, &c. of any accountable, &c. shall be liable to payment of a debt to the queen, as if he had the day he first became an officer stood bound by a statute-staple, &c.*

And

And therefore, if an officer purchases land, and afterwards aliens, or demises *bonâ fide* for valuable consideration; it shall be liable to the king's debt, tho' the money, &c. for which he is accountable was received several years after the alienation; for the statute has relation to the time when he first becomes officer. *R. 10 Co. 55. b.*

And by the *st. 13 El. 4.* lands, &c. which any treasurer or receiver in the court of *Exchequer*, wards and liveries, or duchy of *Lancaster*, treasurer of the chamber, cofferer of the household, treasurer of war, or any fort, &c. of the Admiralty, or navy, treasurer, or other person accountable for any office or charge in the mint, treasurer or receiver of monies imprest for the use of the queen, &c. customer, farmer, or collector of customs or other duties in any port, &c. collector of tenths or any subsidy, receiver-general of any county, shall have whilst he remains accountable, &c. shall be liable.

So, by common law, if the king obtains judgment for a debt of his farmer, &c. his land, which he had the day of the writ purchased, shall be liable. *2 Rol. 157. l. 2. Vide Execution, (D 1, 2.)*

If a plaintiff he amerced *pro falso clamore*, it relates to the day of pledges found.

But execution for the king, as to chattels real or personal, relates only to the award of execution. *2 Rol. 157. l. 5—25.*

And therefore, if the debtor aliens a term for years, or other goods, *bonâ fide*, after the action commenced, or judgment given, before execution awarded, the sale shall be good. *8 Co. 171.*

(G 10.) Who are not liable for the King's Debt.

But if tenant by the curtesy be debtor to the king; his issue shall not be chargeable, tho' he has the lands by descent as heir to his mother. *2 Rol. 157. l. 37.*

Tho' the debtor has no other land. *2 Rol. 157. l. 40.*

If the king grants a manor in fee-farm; the lands or goods of the copyholders are not liable for the rent; for they are elder, being by prescription. *R. 2 Rol. 157. l. 50.*

So, if the king has a rent by prescription, where there is no usage to levy it upon them. *2 Rol. 157. l. ult.*

So, if a joint-tenant be indebted to the king, the moiety of his companion shall not be charged. *2 Rol. 157. l. 37.*

Nor, his cattle, tho' they go upon the whole land. *2 Rol. 159. l. 40.*

So, if a man purchases land to him and his wife, and to the heirs of the husband, for the jointure of the wife, having taken an office, and afterwards becomes indebted to the king, and dies; the estate is not liable during the life of the wife. *2 Rol. 156. l. 30. Dy. 225. a.*

So, if a settlement be made in the same manner for the jointure of a wife, by the husband who afterwards had an office. *2 Rol. 156. l. 35.*

So, if *A.* takes an office, &c. and afterwards makes a settlement upon a son or daughter in marriage, and becomes indebted to the king, and afterwards takes another office, in which he is indebted; the son, &c. though subject to the arrears of the first office, shall not be subject to the money due in the second office. *R. Mo. 127.*

So, if the king's debtor conveys to *A.* who conveys to the king, who re-grants to *A.* rendring rent, these lands are not now chargeable; for tho' the land is chargeable only in respect of the person
of

of the debtor, yet when it comes to the king, it cannot be charged, nor in the hands of the grantee of the king against his own grant. 2 *Roll.* 160. l. 30.

[Legacies charged on land sold, with notice, to the king's debtor, shall be paid. *Poole v. Attorney-General*, H. 7 *Ann. Parker*, 272.]

(G 11.) Suit for the King's Debt.

(G 11.) *In what court it shall be.*] By the *st.* 33 H. 8. 39. all suits for debts or duties to the king, in the offices or courts of the *Exchequer*, duchy of *Lancaster*, augmentation, surveyor-general, master of the wards, or court of first fruits and tenths, shall be sued in such of the said courts or offices in which they first grew due, or in which the recognizance, obligation, or specialty shall remain.

And the said courts shall have full authority to hear and determine the said suits, and do execution on the body, lands and goods, of the party.

(G 12.) *How he shall sue.*] The king may charge him, who enters into his lands, as bailiff or intruder. *Mo.* 476. *Vide Action*, (B 1.) —*Prerogative*, (D 85, 86.)

So, he may charge him, who takes his treasure without warrant, as a trespasser, or in accompt, at his election. *Mo.* 476.

If the king sues a personal action, he may lay it in what county he pleases, by his prerogative. 1 *Sid.* 412. 1 *Vent.* 17. *Vide Prerogative*, (D 85.)

So, a *scire facias* lies against an heir, upon a suggestion of the death of his ancestor, without finding his death by office. *R. Sav.* 3.

[A *diem clausit extremum* may issue for a simple-contract debt to the king. *Rex v. Curtis*, T. 1750, in *Sc.* 1 *Vesey*, 483.]

(G 13.) *When the suit shall be barred.*] By the *st.* 33 H. 8. 39. if any person against whom suit is for debt or duty to the king, can shew and prove matter in law, &c. in bar or discharge of such debt or duty, the court shall acquit, &c. And this by the *st.* 5 R. 2. 9. without letter, or command of the king.

And therefore, to every suit or process for the king's debt, at common law, or by that act, the defendant may allege in bar, any matter for his discharge. 7 *Co.* 19. b. *R. Hard.* 502.

As to a *scire facias* upon an obligation to the king, against the heir and terre-tenants, they may plead, by plea in *Latin*, equitable matter for their discharge: as, that the obligation was given upon a contract for trees growing upon the land of a person attainted, which attainder was afterwards reversed by act of parliament, and the trees were never felled. *R.* 7 *Co.* 20.

And to a bill in equity, any matter may be alleged or pleaded, which will be a discharge in law, or equity. *Hard.* 502.

If the defendant alleges matter in equity for his discharge, and the attorney-general demurs, it will be sufficient proof of the allegation. *Dub. Lane*, 51.

The defendant shall be allowed to defend, by attorney, by the *st.* 5 R. 2. 9. 4 *Inst.* 110.

And no accountant shall be charged before he is summoned. 4 *Inst.* 110.

[If an accountant obtains his *quietus*, it is pleadable to every thing prior to it; tho' he continues an accountant, and becomes indebted to the crown afterwards. *Rex v. Wilkinson*, P. 1732, *Bunb.* 315.]

And he shall be allowed debts due by the king to himself. 4 *Inst.* 110.

After plea, goods seized shall be delivered to the defendant upon sureties. *Sav.* 3.

But in an information for goods, which came to the hands of *B.*, and which he converted to his use, *Not guilty* is no plea; for it denies the conversion only, and does not answer to the account, which ought to be specially answered. *R.* 2 *Leo.* 34.

[On bond to export and not re-land, defendant pleaded the statute of equity, and that the goods were taken away by force; but not allowed. *Attorney-General v. Paul*, in *Sc. H.* 1718, *Bunb.* 37.]

(G 14.) *How the trial shall be.*] By the *st.* 33 *H.* 8. 39. all trials in suits, bills, informations, &c. of issues in the court of *Exchequer*, shall be made by examination of witnesses, writings, proofs, and such other means as the court shall think expedient. *Vide* 4 *Inst.* 110.

Where issue is joined upon a suit in the office of pleas, the trial shall be by a jury.

And the trial by jury may be at bar, or by *nisi prius*.

By the *st.* 5 *R.* 2. 16. nothing but two shillings shall be paid for the record and writ of *nisi prius*.

After issue upon *English* bill, the trial shall be by examination of witnesses in court, or by commission, and other proofs. *Vide* *Chancery*.

After issue joined in an information of intrusion, to be tried by the country, the king may demand that the trial be by record. 4 *Inst.* 109.

(G 15.) *How the proceedings shall be for a debt assigned to the king.*] So, if a debt be assigned to the king, he shall have execution against the body, lands, and goods of the debtor. 4 *Inst.* 115.

If a debt upon obligation be assigned, and the obligor dies, and his executor is sued; he shall not plead a judgment to another and no assets *prater*. *Hard.* 25.

So, if an obligation be assigned to the king, the execution shall take all the lands of the debtor; tho' the obligee himself could have had but a moiety. *Hard.* 24. *Sav.* 133.

So, if a man recovers 500*l.* in an action on the case against *B.* and is afterwards outlawed; the king shall take all the land of *B.* in execution, tho' the plaintiff could have had but a moiety. *R.* 2 *Cro.* 513.

So, if *A.* be indebted to the king, and *B.* indebted to *A.*, the king shall have process against *B.* for the debt due by him to *A.* 8 *H.* 5. 4. a. 4 *Inst.* 111. *Mad.* 666. 668.

So, if *C.* be indebted to *B.*, and *D.* be indebted to *C.*, the king shall have process against *C.* or *D.*, and so against the debtor of his debtor *in infinitum*.

So, before a privy seal made 12 *Jac.* and after the death of king *James*, until a rule made 15 *Car.* 1. the king's debtor might, by *English* bill in the *Exchequer*, have an extent against the debtor of his debtor. *Lane*, 112. *Hard.* 403, 4.

So, if a surety, or a stranger, being distrained for the king's debt,

gives an obligation for payment; process shall go against the principal debtor, and if it be recovered, the obligation shall be re-delivered to the surety. *R. Lane*, 91.

But if a joint-tenant of goods be indebted to the king, he cannot assign all the goods to the king; but his part only. *Cro. El.* 265. *Vide ante*, (G 7, 10.)

So, an obligation, recognizance, &c. for performance of covenants, to indemnify, or for other cause, except for a debt, cannot be assigned to the king. 4 *Inst.* 115. *Cont. Ow.* 46. 2 *Leo.* 55.

So, by the *st.* 7 *Jac.* 15. no debt shall be assigned to the king, which was not originally due to his debtor or accountant.

So, a moiety, or part of a debt, cannot be assigned to the king. *Ow.* 2. 46.

So, if an extent in aid be procured by the king's debtor, who has sufficient to answer to the king, he shall refund with costs upon a bill in equity. 1 *Ver.* 469.

Pleading in Debt.

Vide Pleader, (2 W 1, &c.)

Debet et Detinet.

Vide Pleader, (2 W 8.)

Nil Debet.

Vide Pleader, (2 V 6.—2 W 13. 17. 43. 47.)

Payment of Debts.

Vide Administration, (C 1, 2.)—*Chancery*, (3 A 4, &c.—4 W 14.)

DEVASTAVIT.

Vide Administration, (I 1, &c.)

D E V I S E.

(A) Devise by the Common Law.

A DEVISE is a disposition of a real or personal estate to take effect after the death of the deviser. *Co. L.* 111. a.

By the common law, every person might devise his goods and chattels.

Tho' they were chattels real. 1 *Rol.* 609. l. 5.

As, a term for years. *Ibid.*

An interest which he had as guardian in chivalry, or focage. 1 *Rol.* 609. l. 7.

So, emblements upon the land; and this before the *st.* of *Mert.* 20 H. 3. 2. as it seems 2 *Inst.* 81. *Vide Biens*, (G 2.)

A a 2

So,

So, by the common law, a man might devise the use of lands.
1 *Leo.* 257. *Vide Uses* (A).

Tho' the use was suspended. 1 *Leo.* 257. *Vide Uses* (A).

So, at common law, by the custom of some cities and boroughs, a man may devise his lands within the same city or borough, as chattels.
Co. L. 111. a.

And by the same custom, may devise a rent out of land. *Co. L.* 111. a.

So, if there be a rent *in esse* issuing out of such land, it may be devised; for the rent follows the nature of the land. *Cont. per two J. Dy.* 5. b. 2. *Dy.* 140. a. *Acc. Dy.* 5. b. in marg. 1 *Rol.* 609. l. 20. *Cro. El.* 637. 651.

So, if land devisable be given to a man for life, remainder to another in fee, he in remainder may devise it. 1 *Rol.* 609. l. 30.

So, if land devisable escheats to the king, who grants it to A., the grantee may devise the whole. *R. Dal.* 75.

Though the king grants it to hold by knight-service. *R. Mo.* 70.

And therefore, by custom, lands in *London, Oxford, &c.* may be devised. *Bend. pl.* 145.

And a custom to devise is incident to lands of the nature of *gavel-kind*.

So, a custom will be good, that by a devise, without saying what estate, the devisee shall have a fee. *R. Win.* 1.

By custom, lands were devisable without writing. *Co. L.* 111. a.

And this custom was not taken away by the *st.* 32 & 34 *H.* 8. *Co. L.* 111. b.

But now, by the *st.* 29 *Car.* 2. 3. no bequest of lands devisable by custom is good, unless in writing signed by the devisor, or some other in his presence and by his express direction, and attested and subscribed in his presence by three or four credible witnesses. *Vide post.* (E 1.)

A devise of lands devisable by custom would not be void by the *st.* *Marl.* 52 *H.* 3. 6. upon pretence, that it was by collusion. 2 *Inf.* 112.

And by custom, a will of lands in *London* ought to be inrolled in the *hustings*. *Dal.* 117.

And it ought to be proved by citizens. *Dal.* 117.

And it shall be proved before the ordinary, and then before the mayor in the *hustings*. *Cro. Car.* 396.

But lands were not devisable, if the devisor had only an estate-tail. *Co. L.* 111. a.

So, if a man had a fee expectant upon an estate-tail, the fee was not devisable; for at common law, it was but a possibility, and tho' the *st. de donis* makes it a remainder, the custom does not extend to it. 1 *Rol.* 609. l. 27. *Dub. Sti.* 409.

So, without a custom, no lands or tenements were devisable by the common law. *Co. L.* 111. b. 1 *Rol.* 608. l. 45.

(B) Devise by Statute.

BY the *st.* 32 *H.* 8. 1. and 34 & 35 *H.* 8. 5. all persons having any lands, tenements, rents, or hereditaments, holden in socage, and thereof seised in fee, either sole, or in common, or in coparcenary, in possession,

possession, reversion, or remainder, may, by their last wills and testaments in writing, devise the same to any person (not bodies politic) at their will and pleasure.

And now by the *st.* 12 *Car.* 2. 24. all lands are holden in free and common socage.

(C) Testament Nuncupative, when good.

ALL testaments are nuncupative, or in writing. *Lo. L.* 111. a.
A nuncupative testament is sufficient for goods and chattels; but not for land.

And will be good, tho' reduced into writing after the death of the testator.

Yet before the *st.* 29 *Car.* 2. 3. it ought to be proved.

And before probate, was not pleadable against an administrator. *R. Ca. Ch.* 192.

But by the *st.* 29 *Car.* 2. 3. no nuncupative will shall be good, which gives above the value of 30 *l.* unless proved by three witnesses present at the making, and that the testator, at the time of pronouncing, bid the persons present, or some of them, bear witness that such was his will, or to that effect.

Nor, unless such will was made in the last sickness of the testator, and at his dwelling-house, or where he had been resident ten days next before; except where he was taken sick from home, and died before his return.

Provided, soldiers in actual service, mariners, or seamen at sea, may dispose of any personal estate, as before.

And, by the same statute, no testimony shall be received to prove a nuncupative will six months after making; unless such testimony, or the substance of it, was put in writing within six days after making the said will.

Nor, shall any probate of such will pass the seal of the court till fourteen days after the testator's death expired.

Nor, unless process first issue to call in the widow or next of kin to the deceased, to contest it, if they please.

By the *st.* 4 & 5 (or 4) *Ann.* 16. witnesses allowable in trials at law, are good witnesses to prove a nuncupative will, or any thing relating to it.

By the *st.* 29 *Car.* 2. 3. no will in writing of personal estate, nor any clause therein, shall be repealed or altered by *parol* or will nuncupative, unless the same be put in writing in the testator's life, and afterwards read to him and allowed by him, and proved so to be by three witnesses.

But a man having disposed of part of his estate by his will in writing, may dispose of the residue by a nuncupative codicil. *Ray.* 334.

So, if a residuary legatee, named by a will in writing, dies in the life of the testator, whereby the devise, as to that, is void; he may dispose of it by a nuncupative will, if he does not alter his executor, nor any thing else. *R. Ray.* 334.

So, if any thing be inserted in a will in writing, by *covin*; for, as to that, it is void. *Ray.* 334.

(D) Testament in Writing.

(D 1.) What shall be.

A WILL in writing is not confined to any certain form. *Ch. R.* 195.

And therefore, if a man, being out of the kingdom, writes a letter in which he shews how he will dispose of his land; if it be well executed, it is a good will. *R. Mo.* 177.

[The instrument of a will may be eventual, as well as the disposition in it; as, if a man say, "This is my will, in manner following, "if I die before my return from Ireland," &c.; and in such case, it should not be proved. *Parsons v. Lane*, *H.* 1748, 1 *Vesey*, 189. 1 *Willf.* 243.]

So, if it be written by way of articles of agreement between *A.* and *B.*, and concludes and be sealed and delivered as a deed. 1 *Mod.* 117. 3 *Keb.* 310. *R. Ca. Ch.* 248.

So, notes or memorandums written from the testator's mouth by a physician or scrivener, &c. if they are afterwards executed.

Tho' they were intended to be reduced into form, but are not.

Tho' they were never read to the testator after the writing. *R. Dy.* 72. *a.* *Bend.* 61. 1 *And.* 34.

So, if the testator declares his will, and wishes *B.* was present to write it, whereupon *B.* is sent for by his wife without other direction, and he writes the will in the life of the testator from the mouths of the witnesses present, but the testator was senseless before the writing was finished. *R. Al.* 55.

And it shall be good for so much as the witnesses agree in, tho' they disagree as to another part. *R. Al.* 55.

So, an indenture, by which he gives legacies and makes executors, shall be a will. *R. Ch. R.* 195.

So, notes in writing prepared by *A.*, which he declares to be the effect of his will, and which he delivers to counsel with the deeds of his estate, as instructions for his will in form; tho' he dies before the will drawn by counsel is executed. *R. Ch. R.* 273.

So, if a will in writing be gnawn in pieces by rats; if by collecting of the pieces the particular bequest can be known, it will be good. *R. Al.* 2.

And also, if it cannot be known to a stranger, if the jury finds the gnawing to be after the death of the testator. *Al.* 2.

So, if a will in writing be burnt or destroyed after the death of the testator, it is not avoided. *R. Al.* 55.

Otherwise, if it was destroyed or lost before his death. *R. Al.* 2. 55.

If on the same day *A.* makes his will, and *B.* executor, and also by deed between them, *A.* vests 4000 *l.* in *B.* to pay *A.* an annuity for life, and then to pay 1000 *l.* a-piece to *C.* and *D.*, and an annuity of 100 *l.* for life to *E.*, the residue to *B.*, with proviso, if *A.*'s annuity is unpaid, *B.* to repay the 4000 *l.* to *A.*, to be laid out in the names of *A.* and *B.*; the whole is a testamentary act, and void against creditors, by 13 *Eliz.* *Peacock v. Monk*, *M.* 1748, 1 *Vesey*, 127.

(D 2.)

(D 2.) What not.

But if a man speaks his will, and another, without his direction or privity, reduces it into writing in the lifetime of the testator; this is not a will in writing. *Dy. 72. in marg. R. Al. 54. Cont. 4 Leo. 104.*

Tho' the effect of it be afterwards shewn to him, and he does not disallow it. *R. Dy. 72. a. in marg.*

Tho' he at another time sends for *B.* to write his will, but does not then give him any directions; but he writes that which he is informed the testator before declared for his will. *Al. 54.*

So, if a man writes his will, but says that he will alter it, and dies before alteration or any publication; it shall not be his will. *R. Mo. 874, 5.*

[If a man writes thus, "This is my will, in manner following, if I die before my return from *Ireland*, that my house be sold, and "1000 *l.* given to *A.*," &c. and he returns from *Ireland*, and lives several years, the will is void. *Parsons v. Lanoe, H. 1748, 1 Vesey, 189. 1 Willf. 243.*]

So, if a man makes his will, and thereby devises to *A.* and his heirs, and afterwards, upon the death of *A.*, says to his heir, *that he shall have all the land devised to A.*; without a new publication it is not a good devise, because it is not in writing. *R. Pl. Com. 345. b.*

So, a letter or other paper cannot be used to explain the testator's intent. *1 Sal. 232.*

So, if the instruction be to give *for life*, and the devise written is *in fee*; it shall be void for the whole. *R. per three J. Fenner cont.* that it shall be good for life. *Mo. 356.*

So, if the instruction was, to devise to *A. upon condition*, and the devise be written to *A.*, but before the condition written, the testator dies; the devise shall be void. *3 Co. 31. b.*

So, by the *st. 9 & 10 W. 3. 41.* no will of a seaman contained in the same instrument with a letter of attorney shall be good.

(D 3.) Codicil, what.

A codicil is that which contains any addition to, or explanation of a will.

The codicil is part of the will.

And may be made before, or after the will.

And there may be several codicils to the same will. *Sbo. 549.*

[A codicil differs from a second will in this, that the latter is a revocation of the first will, but the former is no further a revocation than as it is in opposition to some particular dispositions of the will. *1 Vesf. 187.*]

[A will and codicil are to be read, as being made at the same time, and incorporated. *Worsley v. Craven, B. R. E. 19 Geo. 3. cited 1 T. R. 201.*]

(E 1.) How a Testament shall be executed.

AFTER the *st. 32 & 34 H. 8.* it was sufficient that a will was put in writing by the testator, or by another with his privity and direction, without any other execution. *Dy. 53. b.*

So, if notes or instructions were taken of the testator for his will, and it was reduced into form pursuant to such instructions in the life of the testator, tho' it was never read or shewn to him, it was sufficient. *R. Dy. 72. a.*

If it was published, tho' in loose sheets. *1 Sid. 315.*

So, if notes were written for the disposition of part of his estate, it was good for so much. *Dy. 72. a. in marg.*

But if a disposition for life was written in the lifetime of the testator, but not of the remainder, &c. it was void for the whole. *Dy. 72. a. in marg.*

But now, by the *st. 29 Car. 2. 3.* all devises of any lands or tenements shall be in writing signed by the party so devising, or by some other in his presence and by his express directions, and shall be attested and subscribed in the presence of the devisor by three or four credible witnesses.

[The construction of the execution of a will, the same in equity as at law. *1 Vef. jun. 16.*]

[Witnesses may attest the will separately; and if testator acknowledges before each, or signs before one, and acknowledges before the others, it is good; but bad, if he signs it before each, because three different executions, and none good within the *stat.* *Per Ld. Hardwicke C. and Willes C. J. Ibid. 14. 16. Qu. tamen?*]

[A will giving money originally out of land must be executed according to the statute, as well as a will of land. *Brudenel v. Boughton, H. 1741, 2 Atkyns, 268.*]

[A man may, by way of power, by any writing signed by him, be enabled to charge land, (though not executed according to the statute. *Semb.*) *Ibid.*]

And therefore, every will, not signed and attested as the statute directs, is void.

So, every devise and bequest, not so signed and attested.

As, if a testator, after the execution of his will, adds a new clause or bequest, and does not execute his will *de novo*.

So, if a man by a will well executed, devises to *B.* and his heirs, and then *B.* dies, and the testator afterwards makes a new publication of his will, and declares that *B.*, son and heir of the first devisee, (being of the same name with his father, and having a legacy by the same will,) shall take the land which his father would have had; it is not a good devise to the son, for this declaration was not in writing. *Cont. per tres J. in C. B., but judgment was reversed in B. R. 2 Mod. 313. 1 Vent. 341. 2 Jon. 135. Ray. 408. [1 Vef. jun. 12.]*

So, if a will be not signed by the devisor, or by his direction, it is void.

So, if it be signed, and afterwards before witnesses he declares it to be his hand. *Dub. per Cowper, Pr. Ch. 185. [R. Ellis v. Smith, 1 Vef. jun. 11.]*

[So, if the testator be in a state of insensibility when his will is attested, although he be corporeally present. *Right v. Price, B. R. M. 20 Geo. 3. Dougl. 241.*]

[If testator owns his signature to the witnesses, it is sufficient, tho' they did not see him sign it. *Stonehouse v. Evelyn, P. 1724, 3 P. W. 252.*]

[It

[It is not necessary that testator should sign in the presence of the witnesses; if he acknowledge his hand to them, though at different times, it is sufficient. *Grayson v. Atkinson*, T. 1752, 2 *Vesey*, 454.]

Yet if the testator writes his name at the top or side of the paper, it is sufficient; for the statute only requires that it be signed, and not that it be subscribed. 3 *Lev.* 87. [1 *Ves. jun.* 12.]

So, if the testator writes his will with his own hand, which begins, I, A. B., &c. and does not put his name otherwise, but it is sealed, and well executed in other respects, it is good; for it suffices that it was signed in the text of the will. *R. per tot. cur.* 3 *Lev.* 1. *Per Jeffreys*, *Skin.* 227. [1 *Ves. jun.* 12.]

So, if written with his own hand, tho' it be not subscribed or sealed by him. *Per L. Cowper*, *Pr. Ch.* 185.

So, if it be sealed by the testator, and he does not write his name at all, it is good; for the seal is a signing. *Per three J. Levinz dub.* 3 *Lev.* 1. *D. per Holt*, *Sho.* 69. *Semb.* 1 *Sid.* 362. [*Acc. Warneford v. Warneford*, P. 13 G. Str. 764. *Contra per Parker C. B.* *Clive B.* and *Smythe B.* *Smith v. Evans*, M. 25 G. 2. 1 *Wilson*, 313. 1 *Ves. jun.* 13.]

So, if it be signed by the testator, and afterwards attested by witnesses, though the testator did not sign it in their presence. *Adm. per Trevor C. J.* *Peate v. Ougly*, (Com. 197.) *D. per Dolben*, *Sho.* 69. *Adm. per C. B.* P. 11 *Ann. inter Ld. Nappier and Sir Theophilus Napier.* *Semb. Skin.* 227. [1 *Ves. jun.* 12.]

So, if a will for land is not attested and subscribed by three witnesses in the presence of the devisor, it is void. *Eq. Ca.* 130.

[If a will is executed before two witnesses, and then testator says it is his will, in presence of a third whom he desires to attest it, this is not good, unless testator had resealed it. *Semb. Gryle v. Gryle*, P. 1741, 2 *Atkyns*, 176.]

[If testator executes in the presence of two, who attest, and some years after goes over his name with a pen in the presence of a third, who attests, the other two not present; it is a good execution. *Jones v. Lake*, H. 1742, B. R. 2 *Atkyns*, 176. N.]

And, therefore, if a devise be by a will subscribed by two witnesses, and afterwards a codicil is made, which confirms all the devises in the will, and is subscribed by two witnesses, one of which was not a witness to the will, the devise is void: for all the three witnesses ought to attest the execution of the will by which the devise was made. *R. per tot. cur. in B. R. Hil. 1 & 2 W. & M. inter Lee and Libb.* *Sho.* 69. 88. 3 *Mod.* 262. *Carth* 35.

So, if a will was executed in the presence of three witnesses, one of which was a devisee, and therefore it was afterwards executed *de novo* in the presence of two others; the devise is void, if the first execution was not sufficient. *Per Powel inter ——— ex dimiss. Went. Dilke and ———*, *R. Carth.* 514. *Vide infra.*

So, if a will be executed without witnesses, and afterwards a codicil is executed in presence of three witnesses, the will without witnesses shall not be good. *R. 2 Ver.* 598.

So, if a will be executed and attested by three witnesses, and afterwards revoked by a feoffment, and after that the testator republishes his will in the presence of one or two witnesses, it is not good. 2 *Skin.* 227.

So,

So, if a will be subscribed by three witnesses together in a room where the testator cannot see them, it is void; for it ought to be attested in the presence of the testator. *R. P. 2 W. & M. inter Edleston and Speak. Sho. 89. Carth. 80.*

But, if the witnesses subscribe within the testator's view, it is sufficient, tho' it be not in the same room. *R. Carth. 81.*

Or, where the testator may see, though he does not. *R. Sal. 688.*

[The attestation need not state that the witnesses subscribed their names in the presence of the testator. *Brice v. Smith, C. P. E. 10 Geo. 2. Willes, 1.*]

[Though the attestation expresses only, that the will was executed in the presence of the witnesses, without saying that they signed in the presence of devisor, yet it may be a good execution. *Croft v. Pawlett, P. 12 G. 2. Str. 1109.*]

Or, if the will was executed before the statute, tho' the testator died after. *Dub. Pr. Ch. 77.*

So, if a will be subscribed by three witnesses, of which one is a devisee, it is void as to the devise to him; for there are not three credible witnesses to it. *R. per B. R. T. 10 W. 3. inter Jennings and Hillier. (Com. 90. 94.) Per Powel, T. 10 Ann. inter ——— dismiss. ex Went. Dilke and ———.*

[A subscribing witness, who has a legacy to himself, another to his wife, and an annuity out of lands to his wife, is not a good witness. *Anstey v. Dowling, P. 19 G. 2. Str. 1253.*]

[If a witness is alleged to have been a creditor for a bill of fees and disbursements, and it appears on reference, that he is not so at the time of a second examination, and it does not positively appear he was so at the time of attestation, the court will not make a minute inquiry into it. *Price v. Lloyd, T. 1750, 1 Vesey, 503. T. 1751, 2 Vesey, 374.*]

[A. makes his will attested by three disinterested persons, and gives B., C., and D. legacies; by a subsequent will he gives them the same legacies, and they are the subscribing witnesses; they release two days after his death; they are good witnesses. *Earl of Ailesbury's Case, M. 1748, cited by Ld. Mansfield in Wyndham v. Chetwynd, M. 31 G. 2. 1 B. M. 414.*]

[A charge on land to pay debts, does not incapacitate subscribing witnesses who are creditors, even though they want and claim the benefit of it. *Wyndham v. Chetwynd, M. 31 G. 2. 1 B. M. 414.*]

[An objection to a witness, of benefit at the time of subscribing, may be taken off by his being disinterested at or after the death. Thus presumption of bias from a legacy is taken off by a release. *Ibid.*]

[A devisee under a void devise being a subscribing witness, may, by his subscription, authenticate the rest of the will; for such will is only void quoad the devise to the witness. *Ibid.*]

[By *st. 25 G. 2. c. 6.* a devisee of a beneficial devise (except charges on lands for payment of debts) attesting the will; such devise only shall be void, and such person a good witness.]

[If a will charges lands with payment of debts, creditor, whose debt is so charged, is a good witness.]

[Legatee who has been paid, has accepted, released, or refused upon tender, is a good witness; if he refuses, he is barred; if he accepts, he shall retain, though the will is void.] [Legatee

[Legatee attesting will before 1752, and dying before he received, released, or refused, shall be deemed legal witness; but his credit shall be left to the court.]

[Devisee, whose devise is made void, or who refuses, &c. and is examined, shall take no benefit on any pretence.]

[This act extends not to heirs at law, or devisees under former will, in possession for two years before May 1751, or to will contested at law by them before that time; but a possession consistent with a will, or where the estate descended till an executory devise, is not such possession.]

[This act extends to *America*.]

But, if one denies his hand, or is not a credible person, if it be found by other evidence to be well executed, it will be good. *R. Skin.* 79. 413.

[One who has been convicted of petit larceny, and whipt for it, is not a competent witness within 29 C. 2. It is the crime, not the punishment, that creates the infamy, and takes away the competency. *Pendock v. Mackender*, H. 28 G. 2. 2 *Wils.* 18. *Barnes*, 467.]

So, if it be subscribed by three witnesses, who severally subscribe in the presence of the testator, but not together, it will be good. *R. 2 Ca. Ch.* 109. *Cont. per Holt*; but *Dolben acc. Vide Carth.* 37. *R. acc. Eq. Ca.* 263.

Or, if one witness subscribes in one sheet of paper in which the will is written, and the others to another sheet. *Per Dolben, Carth.* 37.

So, if it be published before three witnesses at several times, who all attest in his presence. *R. Pr. Ch.* 185.

Or, all the witnesses subscribe to a paper in which the will is inclosed. *D. Carth.* 37.

[If a will is on two sheets of paper, and testator shews the last to the witnesses, but they do not see the first; if the first was in the room, it is a good execution; if it was not in the room, it is not good. *Bond v. Seawell*, M. 6 G. 3. 3 *B. M.* 1773.]

So, a devise of copyhold without three witnesses will be good: for it passes by the surrender. *R. 2 Ver.* 598. [2 *Atk.* 37.]

[So, a *cestuy que trust* may pass the trust of copyhold lands by a will without witnesses, as if he had the legal estate in him. 2 *Atk.* 38.]

[Where a testator refers expressly to a paper already written, and describes it sufficiently, it is as if incorporated in the will. 2 *Ves. jun.* 228.]

[If land is charged with legacies by a proper devise, the legacies may be given, altered, or revoked by a subsequent will unattested. *Wyndham v. Chetwynd*, M. 31 G. 2. 1 *B. M.* 414. 423.]

[The rule has not been extended to the case of a primary charge on land; but only to a charge in aid of personalty, from the fluctuating nature of which it is necessarily uncertain. 2 *Ves. jun.* 236. 665.]

[Witness to a will not interested at the execution, or at the testator's death, is competent, tho' interested at his examination. *Brograve v. Winder*, 2 *Ves. jun.* 636.]

(E 2.) Publication of a Will.

(E 2.) *What shall be.* If a man seals and delivers his will in the presence

presence of witnesses; this amounts to a publication, tho' the witnesses know not any thing in it.

So, before the *stat. 29 C. 2.* if he had wrote with his own hand, *sealed, and delivered, and published as last will in the presence of,* tho' no witness subscribed it. (*Vide Peate and Ougly, Com. 199.*)

So, now, if it be written, *published as last will, &c.* and the witnesses subscribe it in his presence, tho' he did not say to them that it was his will, and they saw nothing of it. *Adm. per Trevor C. J. Peate and Ougly. (Com. 197.)*

So, if a man executes and delivers his will *de novo*, this amounts to a republication.

So, if he delivers it *de novo*, and says that it shall be his will. *1 Rol. 618. l. 12. Off. Exr. 35.*

So, if upon his bed *in extremis* a man, having several wills, be desired to deliver to another that which he will have to stand, and both are put into his hand, and he delivers the former; this will be a new publication of it. *Off. Exr. 36.*

So, if a man makes a feoffment to the use of his will; tho' this be a revocation of the will, yet it amounts to a new publication of it. *R. 1 Rol. 617. l. 42.*

So, if a man adds executors, and interlines a legacy with his own hand; this amounts to a new publication. *Dub. 1 Rol. 617. l. 50. Dub. Mo. 429. D. Off. Exr. 35.*

So, if a man makes a codicil and annexes it to his will; this amounts to a new publication. *R. 1 Rol. 618. l. 25. Mo. 404. Cro. El. 493. Off. Exr. 35.*

If he says, *that his will lies in a box in his study.* *2 Ver. 209.*

But, it does not amount to a new publication, if the codicil is not annexed to the will tho' both lie upon the table when the codicil is executed, and they are laid up together. *Eq. Ca. 116.*

(E 3.) *When a new publication is necessary.*] If a man makes a will when he has not a capacity to make it, and afterwards the incapacity is removed, yet the will is not good without a new publication; as, if an infant makes a will, he ought to make a new publication after his full age. *R. 1 Sid. 162. Vide post. (H 2. —M).*

If a man makes his will before the *st. 27 H. 8. 10. of uses*, he ought to have made a new publication after the *st. 32 H. 8. 1. Dy. 143. 1 Rol. 617. l. 35.*

If a man after his will makes an alienation, or does any other act, which amounts to a revocation; the land devised does not pass without a new publication. *1 Rol. 617. l. 30.*

So, if a man devises all his lands in *B.*, land afterwards purchased does not pass without a new publication. *R. Pl. Com. 344. a. (Cowp. 90. 305.)*

[So, if a man devise all his real and personal estate, and afterwards article to purchase land, and then die; the heir at law is entitled to this estate as not passing by the will; otherwise had the articles for the purchase of the estate been before the will, for then the estate would have passed. *2 P. W. 629.*]

[But personal estate purchased afterwards shall pass without a republication. *1 P. W. 575.*]

So, if a devise be to *B.* and his heirs, and *B.* dies in the life of the testator; his heir cannot take without a new publication. Or,

Or, to *B.*, and the heirs of his body. *Vide post.* (K).

But if he devises to his eldest son and the heirs of his body, and afterwards to his 2d and 3d son, &c. and the eldest dies in the life of his father, having issue; the issue takes without a new publication. *Per Poph. Cro. El. 424. Adm. 4 Mod. 283.*

[E 4.] *When it shall be sufficient.*] If a man devises all his lands in *A.* and afterwards purchases other lands there; if he makes a new publication of his will, and uses words which shew his intent that the lands newly purchased shall pass by it, it is sufficient to pass them; for the words in the will were apt for that purpose. *R. Cro. El. 493. 2 Jon. 136. Pl. Com. 344. a.*

So, if he says nothing at the time of the new publication, but before upon another occasion says, that he intends the land newly purchased for his executor, (who was the devise of all his lands in *A.*), it is sufficient. *R. Cro. El. 493. Mo. 404. 1 Rol. 618. l. 20. Dy. 143. in marg.*

So, if after the new purchase he newly executes his will, without more. *Dub. 1 Rol. 618. l. 12.*

Or, executes and annexes to his will a codicil as to goods; for this shews his intent, that his will at that time shall stand. *Per Fenner, but the other J. dub. Cro. El. 493. R. cont. 2 Ver. 625. 722. Vide post.* (E 5.)

[A codicil indorsed and duly attested, making additional charge, and confirming the will, is a republication. *Potter v. Potter, P. 1750, 1 Vesey, 437. 442.*]

[So, though it is on a separate paper and not annexed, revoking part and confirming the rest. *Ibid.*]

[Unless it contains a general clause of confirmation of the will. *Ibid.*]

Desiring a codicil to be taken as part of a will, differs not from an actual confirmation. *Semb.* And, therefore, every codicil will do, for it is a further part of a will, whether said so or not. *Semb. Ibid.*

[If after a will of lands, there are articles for a purchase at a future time, and before that time a codicil is made relating to real estate, these lands purchased pass by the will. *Semb. 494.*]

[If a man writes his will of real and personal, on a sheet of paper and signs it, without witnesses; and two years after writes a codicil on the same paper relating only to personal, but declaring it is not to annul any of the former part, and subscribes it in presence of three witnesses, and taking the paper in his hand, declares it to be his will before them, and desires them to attest, which they do; the whole is a good will within the statute. *Carleton v. Griffin, P. 31 G. 1 B.M. 549.*]

So, if he devises to *Robert* his son lands in *A.*, who dies, having a son and heir named *Robert*, and the testator by *parol* makes a republication and says, *my grandson Robert shall have the land in A.*; it is sufficient to pass those lands to the grandson *Robert*: for a devise to a son is sufficient to give to a grandson, if there be not a son of the name. *R. per three J. Scroggs cont.; and that judgment was reversed per Scroggs and others, as it seems, 2 Lev. 243. (Vide 1 Vent. 341. Ray. 408. 2 Jon. 135. Pol. 546.)*

[If a will has been revoked only by implication, as by a change in the testator's

testator's circumstances; it may be republished by reference to it in an instrument attested according to the statute of frauds. *Doug.* 31—40.]

[So, if it be *revoked* by a subsequent will, but not cancelled, it will be established by a cancellation of the second will. 4 *Bur.* 2512.]

(E 5.) *When not.*] But a new publication for another purpose is not sufficient: as, if a testator, after a new purchase, annexes a codicil for legacies; this is not sufficient to pass the land, without words for such purpose.

Or, if he inserts a legacy and executor with his own hand. *Dub.* 1 *Rol.* 617. l. 50. *Per Poph.* 1 *Rol.* 618. l. 10.

If he annexes a codicil concerning personal estate, it shall not be a republication as to lands devised by his will. *R.* 2 *Ver.* 722. [1 *Vesey*, 492.]

Or, if it be not annexed to the will, tho' deposited with it in the same place. *R. Pr. Ch.* 441. 452. 2 *Ver.* 722. *Eq. Ca.* 116.

[*A.* by will devised *all his freehold and copyhold*, &c. in trust for certain purposes, and afterwards purchased new lands, and then made a codicil, whereby, after reciting that he had devised all his freehold and copyhold to the trustees named, he revoked the same so far as related to two of the trustees named, and devised his *said* lands, &c. to the other trustees upon the same trusts; and concluded with declaring the codicil to be part of his will. It was holden that such a republication of the will would not pass the after-purchased lands. *Strathmore v. Bowes*, *B. R. H.* 38 *Geo.* 3. 7 *T. R.* 482.]

So, a new publication, with words declaring his intent, is not sufficient, if the words in the will are not apt for it: as, if a man devises to *A.* and the heirs of his body, and *A.* dies, and afterwards the testator says, that the son of *A.* shall have it; the son shall not take: for he is named only by way of limitation, and a new publication is, as it were, a new devise. *Dub. Cro. El.* 423. *R.* 1 *Vent.* 341. *Ray.* 408. 2 *Jon.* 135. 1 *Mod.* 267. 2 *Mod.* 313. *Pol.* 546. *R. Pl. Com.* 345. b.

[The rule, that after-purchased lands do not pass by a devise, does not arise from the word "having," in the statute of wills; but from the difference between the *Roman* testament, or wills of personal estates, and a devise by the law of *England*; which is an appointment of the person to take the specific estate in nature of a conveyance, tho' fluctuating till death. *Brydges v. Duchess of Chandos*, 2 *Ves. jun.* 427.]

(F) Revocation.

(F 1.) What shall be.

A Testament is ambulatory and revocable till the death of the testator. *Cq. L.* 112. b. [2 *Atk.* 167.]

[There are *virtual* as well as *express* revocations, since the making of the statute as well as before; as, by extinguishing or destroying the thing devised. 2 *Atk.* 272.]

[The execution of a second will is a revocation of the first; and cancelling the second afterwards, does not set up the first again. *Ex parte Hellier*, *P.* 1754, 3 *Atkyns*, 798. *Vide Corp.* 49.]

[Will

[Will signed, and afterwards declared by testator to be his will before three witnesses, a sufficient revocation within the sixth section of the statute of frauds. *Ellis v. Smith*, 1 *Ves. jun.* 11.]

[Will devising lands to him at law, void as to him, but if executed according to the statute, it is a good revocation of a former will. 1 *Ves. jun.* 17.]

[But a second will is no revocation of the first, unless it be inconsistent with the first. 3 *Mod.* 203. *Comb.* 90. 2 *Salk.* 592. 1 *Show.* 537.]

So, if a feoffment or recovery be to the intent to perform his will; the uses are revocable during his life. *R. Dy.* 314. *b.* *Per two J. Mont. cont. Hob.* 349. tho' the uses are declared by a deed.

And therefore, if a testator, after his will executed, makes a feoffment to the use of another; this will be a revocation.

Tho' he afterwards re-purchases the same land. 1 *Rol.* 616. *l.* 15. *cont. per Welsh.* *Dy.* 143. *b.* *in marg.*

Tho' the feoffment be to the use of himself in fee. 1 *Rol.* 615. *l.* 50. [2 *Atkyns*, 273.]

Or, to the use of himself for life, and afterwards to his wife for life, and afterwards to his right heirs. 1 *Rol.* 616. *l.* 5. 50.

So, if the feoffment be to the use of his will. 1 *Rol.* 614. *l.* 32. [2 *Atkyns*, 598.]

So, if he had made it before his will before the *ft.* 27 *H.* 8. and then the statute executes the possession to the use; this will be a revocation. *Cont.* 1 *Rol.* 616. *l.* 10. *Acc.* 1 *Rol.* 616. *l.* 20.

So, if tenant in tail devises, and afterwards suffers a recovery to the use of himself; it is a revocation. *R.* 3 *Lev.* 108. (*Marwood v. Turner*, *H.* 1732, 3 *P. W.* 163.)

[If the tenant in a common recovery does not plead *non-tenure*, he gains a new estate, though the limitations are to the old uses, and it is a revocation of his will. *Bennet v. Wade*, *T.* 1742, 2 *Atkyns*, 324.]

[So, if a man, seised in fee of an estate, devise it, and afterwards, by deed, take an estate for life, and to a son when born, and the heirs of his body, without any trustees to preserve, &c.; this is a revocation of the will. *Diſt.* 3 *Atkyns*, 749.]

[And the same conveyance which would be a revocation of a devise of a legal, will be equally a revocation of an equitable estate. *Id.* 749. 2 *Atkyns*, 598.]

[And, where a man has an equitable interest in fee, in an estate, and devises it, and makes a subsequent conveyance of the legal estate to the same uses; this is a revocation. *Diſt. cont. per Lord Hardwicke.* 3 *Atkyns*, 749. but ruled *acc. per eundem*, 3 *Atkyns*, 764.]

[Therefore, if by articles previous to marriage between *A.* and *B.*, on *A.*'s undertaking to do acts for *B.*'s benefit, she covenant to suffer recovery of her lands to him and his heirs; *A.* makes his will, and devises the lands to *C.*; but not having performed the acts he had undertaken, comes to new agreement, that he shall not take *instantly* in fee, but subject to appointment of *A.* and *B.*, and in default to *C.* and his heirs; recovery suffered to these uses, *A.* dies, leaving his wife without appointment or revoking his will; the recovery and declaration of the uses is a revocation. *Parsons v. Freeman*, *M.* 1751, 3 *Atkyns*, 741. 1 *Willf.* 308.]

[*A.* by his will devised lands to *B.*, and afterwards upon his marriage

riage conveyed them by lease and release to trustees to other uses; with the usual limitations in marriage-settlements, and the court seemed to hold it to be a revocation of the will. *Goodtitle v. Otway*, C. P. E. 35 Geo. 3. 2 H. Bl. 516.]

[Parol evidence was held to be inadmissible to shew that *A.* meant his will to remain in force unrevoked by the subsequent conveyance. *Ibid.*]

[The court of *B. R.* held that the conveyance to trustees, in this case, was a revocation of the will. *B. R. M.* 38 Geo. 3. 7 T. R. 399.]

[Revocations of wills are subject to the same rules at law, and in equity. Articles to settle estates of the husband subject to certain uses and trusts, on the first and other sons in tail-male; remainder to the husband in fee: the husband confirming the articles devised the same estates, in case he should die without issue male, or on failure of issue male in the life of his wife; and by a subsequent settlement in performance of the articles conveyed to trustees, and their heirs, (after certain uses and trusts,) to the use of the first and other sons in tail-male; remainder to himself in fee: the whole fee being conveyed, and some of the purposes being inconsistent with the will and the articles; the will held to be revoked as to the settled estates. *Brydges v. Duchess of Chandos*, 2 Ves. jun. 417.]

[If lands devised are conveyed for a partial purpose, as a mortgage, or payment of debts, it is a revocation *pro tanto* only. *Ibid.*]

[Tenant for life with remainder to trustees to preserve, &c. remainder to himself in fee, makes his will, and then suffers recovery to the use of himself in fee, it is a revocation. *Darley v. Darley*, T. 7 G. 3. in C. B. on a case from Chancery, 3 Wilf. 6.]

So, if the devisor, after his will, makes any conveyance of the land, it will be a revocation. 2 Ca. Ch. 116. [2 Atkyns, 272.]

[The estates devised under the will must remain unaltered till the testator's death, for any alteration, or new-modelling, makes it a different estate, and occasions a different construction at law. 3 Atkyns, 798.]

[A devise of leasehold estate is revoked by surrender and renewal after the will executed. 1 Brown. Ch. Rep. 261.]

[As, if *A.* devises all his real estate to *B.* and afterwards (though the same day) by indenture grants to trustees an advowson in trust, on the first avoidance to present the son of *C.*; but if then, or on any future vacancy, he have no son living, or such son neglect to accept, then the trustees to stand seised in trust for *A.* and his heirs, and on request shall convey to them, and in the same case, shall present such clerk as *A.* or his heirs shall nominate, and in default, whom they think meet; the will (as to the advowson) is revoked by this deed, and it goes to the heir of *A.* *Sparrow v. Hardcastle*, P. 1754, 3 Atkyns, 798. 7 T. R. 416. n. (a).]

[So, if a man be possessed of a leasehold or freehold estate and devise it, and afterwards purchase the reversion in fee; this is a revocation of the will, as far as it extends to this devise. 2 Atkyns, 425.]

So, if a man covenants to levy a fine, and afterwards levies the fine: tho' he makes his will between the time of the covenant and the fine levied, it will be a revocation. 1 Rol. 514. l. 40.

So, if he covenants to make a feoffment, and makes a feoffment
with

with livery, but by some defect in the livery the feoffment is void; yet it will be a revocation. *R. 1 Rol. 615. l. 25.*

[A deed intended to operate as an appointment of uses, but insufficient for that purpose, will have the effect of revoking a will, if such appear to be the party's intention. *Shove v. Pincke, B. R. H. 33 Geo. 3. 5 T. R. 124.*]

[Partition is no revocation of a devise; otherwise, if the object extends farther, though merely to a power of appointment. *2 Ves. jun. 429.*]

[Legal estate taken after a devise of the equitable estate: that is no revocation. *Ibid.*]

[Recovery after a devise, tho' without intention to revoke, is a revocation. *Ibid. 430. 599.*]

[A covenant may be a revocation of a will. *Ibid. 436.*]

[By marriage articles the husband covenanted to convey to the use of himself for life, remainder in trust to secure an annuity to his wife for life, in bar of dower; remainder to trustees for years to raise portions, remainder to the sons and daughters successively in tail, remainder to his own right heirs; afterwards he devised on condition that he should leave no issue; and subsequent to the will, in pursuance of the articles, he conveyed to trustees and their heirs to the uses and trusts of the articles. The will held by *M. R.* not to be revoked. *Williams v. Owen, 2 Ves. jun. 595. Vide Kenyon v. Sutton, cited ibid. 601.*]

[Articles to sell a devised estate are a revocation in equity, but not at law. *Ibid. 601.*]

So, if he devises a reversion, and afterwards grants the reversion by deed, but the grant is void for want of attornment; yet it will be a revocation, for he has fully shewn his intent to revoke. *Per two J. 1 Rol. 615. l. 30. [3 Atkyns, 803.]*

So, if he devises land, and afterwards sells by bargain and sale, and acknowledges it in order to be inrolled, but it is never inrolled. *Per two J. 1 Rol. 615. l. 40. [3 Atkyns, 803.]*

So, if he makes a charter of feoffment for the whole, and livery only for part; it will be a revocation for the whole. *R. Mo. 429.*

So, if he devises, and afterwards, in consideration of an intended marriage, makes a settlement by lease and release; it will be a revocation, tho' the marriage does not take effect. *R. Ca. Parl. 157.*

[And tho' such marriage never was intended. *3 Atkyns, 803.*]

[So, if a man seised in fee, thinking he had an estate-tail only, suffers a recovery to confirm his former will, yet it is a revocation of it. *Ibid. 804.*]

So, if a man devises land, and afterwards devises the same land to another; tho' the second devise is void for the incapacity of the devisee. *R. 1 Rol. 614. l. 45. 50.*

Or, devises to another by *parol*. *Per Poph. 1 Rol. 615. l. 42. Vide infra.*

So, if he devises to *A.* in fee, and afterwards leases to *A.* for years, to commence after his death; for it is inconsistent. *R. 2 Cro. 49.*

Tho' the lease be delivered to a stranger, without the privity of *A. R. 2 Cro. 49.*

So, if he devises a lease *per auter vie*, and afterwards renews the lease. *Dub. 2 Ver. 209.*

[If one seised of a lease for lives, devises it, and then surrenders it, and takes a new lease to him and his heirs for three lives, it is a revocation of the will. *Marwood v. Turner*, H. 1732, 3 P. W. 162.]

[But not in the case of a lease for years. *Ibid.*]

[If a man devises a college-lease, and afterwards surrenders it, and renews, it is a revocation. *Abney v. Miller*, T. 1743, 2 Atkyns, 593.]

[If A. seised of lands, and possessed of a lease of tythes, devises all her land and tythes, and afterwards surrenders lease, and takes a new one; the tythes do not pass without republication of will. *Rudstone v. Anderson*, T. 1752, 2 Vesey, 418.]

So, if a man devises, but is afterwards disseised, and does not re-enter before his death; it will be a revocation. 1 Rol. 616. l. 25.

So, if a man devises land to one, and by the same will afterwards gives an estate, inconsistent with the first, to another; this will be a revocation. Co. L. 112. b.

[So, if by will a man charge lands with a portion for his daughter, and afterwards in his lifetime give her that portion, this is a revocation of the charge. 2 Atkyns, 273.]

So, if a woman makes a will, and afterwards marries with the devisee, and dies; it will be a revocation. R. 4 Co. 61.

So, if a man by parol says, *I revoke my will*, and desires the witnesses present to witness it, and adds, *that he will alter it when he comes to D.* It will be a revocation, tho' he dies before he comes to D. R. Dy. 310. b. 1 Rol. 614. l. 30. Per Rol. St. 343. 418. *Vide post.* (F 2.)

So, if the testator says, *animo testandi*, A. (who was his heir at law) *shall be my heir.* Per cur. 1 Sid. 73.

So, if he says, *I do revoke*, and desires those present to witness it, without more. 2 Cro. 497.

Or, *my will shall not stand*: for tho' the words are in the future tense, they shew a present resolution. R. Cro. El. 306. Ow. 76. *All these were cases at common law. Vide post.* (F 2.)

So, if a man makes a will, and devises his personal estate to A. and afterwards marries, and has several children, and dies a long time after the will made; it shall be presumed a revocation by the alteration of his circumstances. R. Sal. 592. *Vide post.* (F 2.)

If he devises his real and personal estate to his brother, and makes him executor, and afterwards marries, and by a codicil makes his wife executrix; she shall have the personal estate, for it was intended for the brother only as he was executor. 1 Ver. 23. [*Vide 1 Vesf.* 189. 1 Willf. 243.]

If he devises his lands to charitable uses, and afterwards devises the same estate to others to such uses as he shall afterwards declare, and dies before any declaration of the uses; the subsequent will shall be a revocation, tho' no estate passes thereby, the uses not being declared. Eq. Ca. 8. (2d Part of 2 Mod. Ca.)

[So, an incomplete act, and void at law, may be a revocation. 3 Atkyns, 73.]

[As, if a man by will give all his real and personal estate to his brother, and make him executor, and afterwards by deed-poll grant to his wife all his substance that he has or hereafter may have, it is a revocation of the will, though it cannot take effect as a grant to the wife; but the personal estate must be distributed. *Beard v. Beard*, P. 1744, 3 Atkyns, 72.]

[So, though a second will be not executed according to the statute of frauds, yet it will be a revocation, if, otherwise, it would have been so. 2 *Atk.* 268.]

So, if he devises a real estate to a stranger, and afterwards marries and has issue; it will be a revocation as to the real as well as the personal estate. *R. Eq. Ca. Abr.* 413.

But if the devise was to a stranger, whom he afterwards marries, and the disposition appears reasonable, *Chancery* will establish it. *R. T.* 1702, *Eq. Ca. Abr.* 413.

[A revocation of money charged on land must be in the same manner as a revocation of a devise of land. *Brudenel v. Boughton*, *H.* 1741, 2 *Atkyns*, 268. 272.]

[In all cases where a man gives a personal legacy charged on land, and the will is revoked, the legacies are gone; for where the land is meant only as a collateral security, if the thing secured be taken away, the security itself cannot subsist. 2 *Atk.* 273.]

[Where the same thing is described generally, and given to two different persons in the former and latter part of a will, the better opinion seems to be that the latter words revoke the former. 2 *Atk.* 374.]

[Testator devised all his real estate to his sister for life; remainder to her children, as she should appoint; for want of appointment, to all her children and their heirs, as tenants in common. His sister having two daughters, by a codicil, declared to be a codicil to his will, not then at hand, he gave one of them an annuity, and directing his annuities to be paid out of his 3 per cent. stock, he charged them on his real estate, in case of a deficiency; and directing the residue of his personal estate to be invested in freehold lands and hereditaments, he recommended to his sister to settle and convey, or join with her husband in settling and conveying all his estates and property, which she might derive from him after his decease, to the use of her two daughters for life, in such parts, shares, and proportions, as she should approve, with remainder to their respective issue and cross remainders, and the usual powers and clauses in strict settlement. The testator's sister died in his lifetime, and her two daughters were his co-heiresses. Some real estates were purchased between the executions of the will and codicil; as to the real estate the will is not revoked, but is republished by the codicil, and the two nieces are entitled to all the real estates, and to those directed to be purchased, as tenants in common in fee. *Meggison v. Moore*, 2 *Ves. jun.* 630.]

(F 2.) What not.

But if a testator makes an estate by act executed, it is a revocation only so far as that estate is inconsistent with the devise: as if, after a devise in fee, he leases the same land for years; it is a revocation only during the term. *R.* 1 *Rol.* 616. l. 37.

So, if he leases for life, it is a revocation only for the life of the lessee. 1 *Rol.* 616. l. 40.

So, if he leases to a stranger for years to commence after his death; it is a revocation only for the years. 2 *Cro.* 49. *R. Cro. Car.* 23.

[So, if he leases to the devisee himself, to commence immediately,

or at a future day in the life of the testator, or for ten or twelve years. 2 Cro. 49. *Villiers v. Villiers*, M. 1740, 2 Atkyns, 71.]

So, if a termor of a term for 40 years devises it, and afterwards leases for 20 years; it is a revocation only for 20 years. 1 Rol. 616. l. 45.

So, if a termor devises his term, and afterwards mortgages and redeems it, the devisee shall have it. Dy. 143. b. in marg.

So, if a man devises, and afterwards mortgages the same land, the devisee shall have it subject to the mortgage. Per Moreton, Ca. Ch. 193. 1 Sal. 158. 1 Ver. 97. Cont. 1 Ch. R. 153, 4.

[Tho' the mortgage be by deed and find. 2 P. W. 334.]

Tho' the mortgage be in fee; for it is but a security. Ca. Parl. 155, 156. R. 1 Ver. 329, 342. [3 Atk. 805.]

[So, if a mortgagor devise the mortgaged premises, and afterwards pay off the mortgage money, and the mortgagee convey the legal estate to a trustee, in trust for the mortgagor, such a transfer of the legal estate shall not operate as a revocation of the will. Doug. 710.]

So, if a man makes a feoffment, and when he seals the deed asks, *if it will not prejudice his devise of the same land? for then he will not seal it*, and livery is made by attorney in part; it will be no revocation of the part whereof livery is not made. R. Ow. 76. Goldsb. 32.

[So, cancelling a former will by mistake, or on a presumption that a latter will is good, which proves void, will not be a revocation. 1 P. W. 345.]

[Cancelling is an equivocal act, and in order to operate as a revocation, it must be done *animo revocandi*. Prec. Chan. 459. 2 Vern. 741. 1 Wils. 313. 2 Atk. 268. 4 Bur. 2512. Cowp. 49, 87. Doug. 30, 684.]

If he devises a lease for three lives, and afterwards makes a lease for three other lives; it will be a revocation only for the lease; for the lives in the lease may determine before those in the will. R. 2 Ver. 496.

[If one devise to his wife six messuages for her life, the rest of his real estate equally to his two daughters in fee; after which, on the marriage of his eldest daughter, he covenants to settle one moiety on her and her husband; the devise of the six houses shall be good, and subsist out of the remaining moiety. 2 P. W. 333.]

[If a prebendary demises an estate belonging to the prebend to a child, who executes a declaration of trust to the father for life, and then to such person as he by deed or will shall appoint; and such lease is surrendered and renewed with like declaration of trust yearly, and he makes his will, and after some legacies makes his eldest son residuary legatee, with a clause declaring he shall have the disposal of the lease, and afterwards the lease is surrendered and renewed, with declarations of trust as before; the will passes the trust of the lease in being, and of the subsequent also. *Carte v. Carte*, H. 1744, 3 Atkyns, 174.]

[If a man devises all and singular his *leasehold estate*, goods, chattels, and personal estate whatsoever, to his daughter, and afterwards renews a church lease; this is no revocation; for it is not a specific legacy, but only an enumeration. *Stirling v. Lydiard*, M. 1744, 3 Atkyns, 199.]

So, if a devisor devises an estate to one, and afterwards devises by the

the same will to another, it is no revocation if they are consistent : as, if he devises land to *A.* and afterwards rent out of it to *B.* *Pl. Com.* 523. *a.* 541. *a.*

If he devises a term to *Thomas* and afterwards to his mother during his minority. *R. Pl. Com.* 541. *a.*

So, if he devises all his lands to *A.* and afterwards land in *D.* to another; *A.* shall have all, except the land in *D.* *R. Yel.* 210. 2 *Cro.* 49. *Acc.* 2 *Roll.* 276. *R. Dal.* 3.

So, if he devises all to *A.*, and afterwards all to *B.*, they shall be joint-tenants. *R. Yel.* 210. *Dy.* 4. *a.* in marg. *Vide post.* (N 8.)

Or, to *A.* and his heirs, and if he dies without issue, to *B.* and his heirs; *A.* shall have an estate-tail, remainder in fee to *B.* *R. Yel.* 209. 2 *Cro.* 290.

So, if a verdict finds, that *A.* made his will, and afterwards made another will, but the jurors do not know the contents; it is no revocation, for they may be consistent. *R.* 3 *Mod.* 204. *Sho.* 537, &c. *R. Sal.* 592. *Ca. Parl.* 146. *R. Hard.* 375.

[On a special verdict, "that *A.* in 1748, by will duly attested, &c. devised all his real and personal to *B.*, her heirs, executors, &c. for ever, directs her to pay several legacies, and makes her executrix, that in 1756, *A.* made another will duly attested, &c. that the disposition made by *A.* in the will of 1756, was different from the disposition thereof in the will of 1748, but in what particulars is unknown to jurors, but they say they do not find that *A.* cancelled will of 1748, nor that *B.* destroyed the same; but what is become of it they are altogether ignorant;" it was determined to be a revocation. *Three J. contra, Blackstone, Goodright v. Harwood, H.* 14 *G.* 3. 3 *Wils.* 497. But this judgment was afterwards reversed on a writ of error by *B. R.* and the judgment of *B. R.* affirmed on a writ of error to the House of Lords. 2 *Bl. Rep.* 937. *Cowp.* 87. 7 *Brown's Ca. Parl.* 344.]

So, if a woman makes a will, and marries; it is not a revocation, if she survives her husband. *Pl. Com.* 343. *a.*

[Alterations in families (at the birth of a child) do not revoke a will of lands by the strict law of England. *Driver on demise, &c. v. Standring, P.* 32 *G.* 2. 2 *Wils.* 88.]

[Marriage and the birth of a posthumous child amount to an implied revocation of a will of lands made before marriage. *Lancashire v. Lancashire, B. R. M.* 33 *Geo.* 3. 5 *T. R.* 49.]

[No case has yet holden marriage alone to be a revocation, tho' marriage and a child is, either of personal or land. *D. per Id. Mansfield, Wellington v. Wellington, H.* 8 *G.* 3. 4 *B. M.* 2165.]

[Marriage and a child are only a presumptive revocation of a will, except in the case of a total disposition of the estate. *Doug.* 39. *Vide Doug.* 34—40. where this subject is fully discussed. *Vide* 1 *P. W.* 304. which seems *cons.*]

[Which presumption may, like all others, be rebutted by every kind of evidence. *Doug.* 39.]

If tenant in common makes a will, by which he devises his part, and afterwards makes partition; this will not be a revocation. *R. Ray.* 240. 1 *Sid.* 90.

[Tho' they make partition by deed and fine. *Per B. R. and King C. Luther v. Kedby, P.* 1750, 3 *P. W.* 169.]

So, if a testator revokes part of a devise, is is no revocation as to the residue. 1 *Rol.* 617. l. 25.

If he devises for 49 years, and afterwards leases for 20, it shall be a revocation only for 20 years. *Vide supra.*

If he devises in fee, and afterwards makes a mortgage, the devisee has the equity of redemption.

If he disallows a condition annexed to the devise, it is no revocation of the devise. 1 *Rol.* 617. l. 15.

If he devises land for payment of debts, and then to pay 200 *l.* *per ann.* to his wife, and afterwards sells part for payment of debts; the wife in equity shall have 200 *l.* *per ann.* out of the surplus. 2 *Ver.* 241.

If he devises land to trustees, to be settled upon a daughter, if she marries with consent; she marries with consent in the life of her father, who settles part upon her and her husband; it shall be no revocation of the devise as to the residue. *R.* 2 *Ver.* 721.

If he devises to *A.*, *B.*, *C.*, and *D.*, as trustees, upon trust, &c. and afterwards revokes that part of his will by which *A.* and *B.* are named trustees, and appoints that *E.* and *F.* shall be his trustees, without more; this revokes nothing but the two trustees, and constitutes two others in their stead. *R. Eq. Ca.* 68. 77. (2d Part of 2 *Mod. Ca.*)

[If *A.* by his will devises lands to trustees for a charity, and by codicil devises the same lands and some others to the same trustees, and two others, upon the same trusts; and makes alterations of some other parts of his will, and confirms all other parts; this is not a revocation of the trust for the charity. *Willet v. Sandford, M.* 1748, 1 *Vesey*, 178. 186.]

If a stranger cancels or tears a will after the death of the testator; it shall not be thereby destroyed, if the pieces can be collected. 2 *Ver.* 441.

If a testator says, *he will revoke*; this does not amount to a revocation. *R.* 2 *Cro.* 497. *Cro. El.* 306. 1 *Rol.* 615. l. 5. *Mo.* 874.

So, if he does not revoke of himself, but in answer to questions. 2 *Cro.* 497. *Cro. Car.* 52.

So, if upon a question, *whether he will make a will?* he says, *that he will not make any.* *Ow.* 76. *Goldsb.* 33.

So, words not spoken *animo testandi* do not amount to a revocation: as, *A. shall be my heir*; tho' he be his heir at law. 1 *Sid.* 73.

Or, if *A.* be not his heir at law, tho' spoken *animo testandi*; for they denote his intention only. 1 *Sid.* 73.

So, accidental words do not amount to a revocation: as, *A.* (who was devisee, and did not visit the testator) *shall have no part of my lands and goods*, without speaking of his will. *R.* 2 *Cro.* 115.

So, if *A.* before his death, being asked if he will give legacies to his brothers, says, *animo testandi, I will give them nothing*; this does not revoke a former will which gave legacies to them. *R. Cro. Car.* 52.

So, if he be not *compos mentis* at the time, the revocation is not good. 2 *Cro.* 497.

And now by the *st.* 29 *Car.* 2. 3. no devise of lands, &c. nor any clause thereof, shall be revocable, but by will or codicil in writing, or other writing declaring the same; or by burning, cancelling, tearing, or obliterating the same by the testator, or in his presence, and by

by his direction: but all devises of lands, &c. shall remain in force till the same be burnt, cancelled, torn, or obliterated by the testator, or his directions, or altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same.

By the same statute, no will in writing of personal estate shall be altered by any words, or will by word of mouth only, unless put in writing in the testator's life, and afterwards read to and allowed by him, and proved so to be by three witnesses. *Vide ante* (C).

If a will be attested by three witnesses, but not in the presence of the devisor, whereby it is a void will, it shall not be a revocation of a former will, within the words (*or other writing signed in the presence of three witnesses, &c.*) *R. P. 2 W. & M. Eddleston and Speak, Sho. 89. 3 Mod. 259. Carth. 80. Cont. per two J. Lut. acc. 3 Mod. 218. [Cont. 1 P. W. 343.]* (N. B. The second will in *3 Mod. 218.* was published and attested by three witnesses in the presence of the devisor, but not signed by him in their presence.)

Tho' there be words in it which revoke all former wills. *R. inter Eddleston and Speak; tho' it is reported cont. 3 Mod. 259. yet Sho. 89. acc. R. Eq. Ca. 130, Pr. Ch. 460. [acc. 1 P. W. 344.]*

So, if another will be prepared, and the draught signed by the testator, and directed to be ingrossed, who then cancels all the sheets of the former will, except one, (which was left upon information, that the other will was not sufficient for the land until duly executed,) and he dies before the execution of the latter will, the former shall not be revoked. *R. per Ld. Chan. 27 Jan. 6 An. inter Hide and Hide, Eq. Ca. Abr. 409. Pr. Ch. 460.*

[So, a devise of real estates to trustees to be sold, was held not to be revoked by alterations, obliterations, and interlineations, made by the testator himself in other parts of the will. *Sutton v. Sutton, B. R. E. 18 Geo. 3. Cowp. 812.*]

[*A.* makes will in 1757, a second in 1763, both giving the same lands to *B.*, he cancels the second but not the first, both are in his own custody at his death, this is not a revocation of the first. *Goodright v. Glazier, H. 10 G. 3. 4 B. M. 2512.*]

[But where the cancelling of a second will, and one part of the first, does not set up the remaining duplicate of the first. *Cowp. 49.*]

So, if another will was executed, but the witnesses did not subscribe in the presence of the testator; the former, tho' cancelled, shall not be revoked. *R. 2 Ver. 742. Eq. Ca. 130.*

If he devises copyhold, and afterwards obliterates other legacies, and writes *that he approves it so obliterated*, but dies before publication in the presence of three witnesses; it is no revocation as to the devise of the copyhold. *R. 4 Ver. 498, 9.*

But if, under the name of the testator in any will executed, it be written *A. B. revokes his will as to, &c.* in the presence and by the direction of the testator, and this be subscribed by three witnesses; tho' it be not subscribed by the testator himself, it shall be a revocation. *Semb. 3 Lev. 87.*

So, if a man devises the *residuum* of his personal estate to *A.* who dies in the life of the testator; he may, by a nuncupative codicil, make *B.* residuary legatee: for this is not an alteration of the former

will, but a disposition of that which became void by the death of the former legatee. *R. Ray.* 334. *Vide ante* (C).

If a man has duplicates of his will, and cancels one; it will be a revocation, tho' the other be not cancelled. *R. 2 Ver.* 742. *Eq. Ca.* 131. [1 *P. W.* 346. but it must be done *animo revocandi*. *Vide supra.*]

If a man makes a writing, with intent to revoke a former will; it may be a revocation, tho' not executed in such manner as is sufficient for a new will. *Eq. Ca.* 131.

So a revocation by act in law is good, since the *st.* 29 *Car.* 2. 3. *Carth.* 81.

[If a man makes his will, and devises all his real and personal estate to trustees on several trusts, and afterwards by one deed of subsequent date conveys his real, and by another deed grants his personal estate unto and to the use of the same trustees, with proviso in each, to be void on tender of 10*s.* and keeps the deeds in his own custody, and dies; this is not a revocation. *Lloyd v. Spillet, M.* 1734, 3 *P. W.* 344.]

[If a man devises a college lease, and afterwards intends to renew, but dies before the college seal is put to the new lease, it is not a revocation. *Abney v. Miller, T.* 1743, 2 *Atkyns*, 593.]

[If a man devises all his estate, right and interest, he shall have to come in a college lease at his death, it passes tho' he renew. *Ibid.*]

[If a man duly makes his will of copyhold, and afterwards signs a paper, "Know all men I have this day covenanted and agreed as follows.—For the love I bear my son, daughter, and grandson, I make, constitute, and appoint, the several estates and sums of money, after my death, and my wife's, to come to them, &c. and as to the copyhold, to my daughter A., her heirs and assigns, for ever, after the immediate death of myself and wife;" it is no revocation. *Wright v. Littler, M.* 2 *G.* 3. 3 *B. M.* 1244.]

[If deed to declare the uses of a recovery be executed and a writ of entry sued out, a will made subsequent, but before the return of the writ of entry and acknowledgment of bargain and sale, is not revoked by the recovery. *Selwyn v. Selwyn, H.* 1 *G.* 3. 2 *B. M.* 1131.]

[A surrenders to the uses of his marriage-settlement the reversion in fee to himself, and afterwards surrenders to the use of his will, after that makes his will, and after that is admitted on the first surrender, then first presented, this is not a revocation. *Roe v. Griffiths, M.* 7 *G.* 3. 4 *B. M.* 1952.]

(G) Who may devise.

ALL persons generally, who may grant, may make a devise.

The king may make a will, and devise his lands or goods. 4 *Inst.* 335. And this was affirmed by parliament. 16 *R.* 2. No. 10.

So, the queen, the king's wife, may make an executor. 1 *Rol.* 912. *l.* 12.

So, an alien, or a person outlawed, or attainted, may make a will and executor for some purposes. *Off. Exr.* 22, 23. *cont.* of a person attainted. 1 *Rol.* 912. *l.* 25.

A man

A man outlawed in a personal action may make an executor, or have an administrator. 1 *Rol.* 912. l. 32.

So, a man against whom an exigent is awarded for felony. 5 *Co.* 111.

So, an ecclesiastical person may devise his goods and lands temporal: as, a bishop, dean, archdeacon, parson, &c. 1 *Rol.* 608. l. 13, &c.

(H) Who not.

(H 1.) *Non Compos.*

BUT one *non compos mentis* cannot devise. 6 *Co.* 23. *Off Exr.* 21. *Dy.* 204. a. *ft.* 34 & 35 *H.* 8. 5.

And it is not sufficient that he can answer to familiar questions, if he has not power and discretion to dispose. 6 *Co.* 23. a. *Dy.* 72. a. *in marg.* *Mo.* 760.

So, a custom that an idiot or *non compos* shall devise, is void. 2 *And.* 12.

But a will shall not be avoided, if made by the importunity of others. *Cont. per Rol. Sti.* 427.

Or, by artifice; for if it be well executed, that shall not be examined. *R.* 3 *Ca. Ch.* 103. *Vide Chancery.* (3 A 1, &c.)

Or, if the disposition be imprudent. 2 *Mod. Ca.* 59.

(H 2.) *Infant.*

So, an infant under the age of 21 years cannot devise his lands. 1 *Sid.* 162. *ft.* 34 & 35 *H.* 8. 5.

Nor goods or chattels, under the age of discretion, viz. a female under 12, and a male under 14. *Cont. Perk.* that he may devise at 4. *Perk. Devise,* 503. *Off. Exr.* 305. But *Co. L.* seems that he cannot till 17. *Co. L.* 89. b. Agreed that a female after 12, and a male at 17, or at 15, if he be then of discretion, may devise. 2 *Ver.* 469. *Eq. R.* 74.

And it belongs to the spiritual court to determine, at what age he may make a will as to goods and chattels. *R.* 2 *Jon.* 210. 2 *Mod.* 315.

And if the spiritual court determines, that he may devise them before the age of 21, a prohibition does not go. 2 *Jon.* 210. 2 *Mod.* 315.

But the same day on which he attains full age, he may make a will of lands: as, if he be born the 15 May 1660, he may make it the 14th May 1681. *D.* 1 *Sid.* 162.

And if he makes a will under age, and publishes it *de novo* after full age, it is good. *R.* 1 *Sid.* 162. *Vide ante,* (E 3.)—*Post.* (M).

So, by custom, after 14 an infant may devise; but to devise at 8, or 9, is a void custom. 2 *And.* 12.

(H 3.) *Feme-Covert.*

So, a *feme-covert* cannot make a will during her coverture. *Co. L.* 112. 1 *Rol.* 608. l. 35. 609. l. 40. 912. l. 20.

By the *ft.* 34 & 35 *H.* 8. 5. she cannot devise lands.

Nor, can she make a will to dispose of her *choses in action.* 1 *Rol.* 608. l. 30. *Semb. cont.* 1 *Sal.* 313.

Or,

Or, things which she has as executrix. 1 *Rol.* 608. l. 25. *Cont.* per *Holt*, 1 *Sal.* 313. Per *North*, 1 *Mod.* 211.

Yet, she may make an executor for such *choses in action*. 1 *Rol.* 912. l. 17. *Cont. Off. Exr.* 285. 289.

If she be an executrix, she may make an executor for things which she has as executrix. 1 *Rol.* 608. l. 30. 912. l. 14. *Off. Exr.* 289. She may with the assent of her husband. 1 *Mod.* 211. *R. Mo.* 339. 2 *And.* 92.

But, if an husband covenants or agrees before marriage, that his wife shall make a will; tho' it be a void will, the disposition by it shall be good. *R. Cro. Car.* 219. 376. 597. *R. Cro. El.* 27.

But it is not properly a will, nor proveable by the ordinary. Per *Holt*, 1 *Sal.* 313. *Semb. cont.* 2 *Mod.* 172. *Pr. Ch.* 84. *Acc.* 1 *Mod.* 211.

[If the question is, whether she had power to make appointment in nature of a will? the ecclesiastical court has not jurisdiction, and *B. R.* will grant prohibition; but if she has such power, the paper must be established by ecclesiastical court, either by probate, or (rather) by administration, with the paper annexed. *Jenkin v. Whitehouse*, *M.* 31 *G.* 2. 1 *B. M.* 431.]

[Otherwise, it cannot be given in evidence. *Doug.* 707.]

So, if a wife devises by will, and the husband assents to it after her death, it will be good. *Semb.* 1 *Rol.* 608. l. 23. *R.* 1 *Mod.* 211.

And any approbation amounts to an assent. *R.* 2 *Mod.* 172.

An assent given before marriage shall be understood to be continuing, if a dissent does not appear. 2 *Mod.* 172.

And if an assent be once given after the death of the wife, he cannot afterwards dissent. 2 *Mod.* 172.

So, by the custom of *London*, a *feme-covert* may devise to her husband.

Or, to another, with the assent of her husband.

So, where the husband is banished for his life, by act of parliament, his wife may make a will; for she may in all things act as a *feme-sole*. 2 *Ver.* 104, 5.

[A will by a wife of her separate property and its produce is good, whether such separate property is derived from her husband or a third person. But if the wife make no disposition, the husband succeeds as next of kin, and not in consequence of the marital rights. 1 *Ves. jun.* 46, 3 *Bro. Ch. Ca.* 8.

Vide post. (M).

(H 4.) Person dead in Law.

So, a person dead in law cannot make a devise: as an abbot, prior, &c. 1 *Rol.* 608. l. 16.

(H 5.) Corporation-Aggregate.

So, a body politic aggregate cannot devise the lands or goods of the corporation.

(H 6.) Corporation Sole.

So, a sole corporation cannot devise lands, &c. which it has in its corporate capacity: as, a master or warden of an hospital cannot devise the lands or goods of his house. 1 *Rol.* 608. l. 20.

(H 7.)

(H 7.) Joint-tenant.

So, a joint-tenant cannot devise lands which he holds jointly: for the *st.* 32 & 34 *H.* 8. enables only persons seized solely, or in common, or in parcenary.

So, joint-tenants and to the heirs of one of them, he who has the fee cannot devise during the life of his companion. *Per. Windh.*; but *Twissd.* said, that there are opinions both ways. *Ray.* 40.

But, by the custom of *London*, a joint-tenant may devise.

[A will made by joint-tenant during the jointure is not good, even for his share, though there is a subsequent severance, by partition before his death, and he has the premises devised for his purparty (unless the will is republished). *Swift v. Roberts*, *T.* 4 *G.* 3. 3 *B. M.* 1488. 1 *Bl. Rep.* 476.]

(H 8.) Tenant in Tail.

So, tenant in tail cannot devise the lands entailed.

And tho' he afterwards suffers a common recovery, it does not enure to the benefit of the devisee. *R.* 3 *Lev.* 108.

(H 9.) Tenant *per auter vie*.

So, if tenant in tail, by indenture inrolled, bargains and sells to *A.* and his heirs, by which he has an estate *pur auter vie*; *A.* cannot devise it: for an estate *per auter vie* was not devisable by the 32 & 34 *H.* 8. *R.* 1 *Sand.* 261. *D.* 1 *Leo.* 252.

And, if *A.* had devised, and afterwards the tenant in tail levies a fine; this does not enure to the benefit of the devisee, but to the benefit of the heir of *A.*, who takes the estate as special occupant. *R.* 1 *Sand.* 261.

Yet, by the *st.* 29 *Car.* 2. 3. an estate *per auter vie* is devisable by will in writing signed by the party devising the same, or by some other in his presence and by his express direction, attested and subscribed in the devisor's presence by three or more witnesses.

(I) Who may take by Devise.

ALL persons may take by devise, who can take by grant.

So, a *feme covert* may take by the devise of her husband. 1 *Rol.* 610. l. 3. *Vide post.* (K).

So, a person attainted, tho' the devise be to the next of blood. *Per two J.* 2 *Rol.* 256, 7.

So, an infant *en ventre sa mere* may take by devise, and the land shall descend to the heir, till its birth. *Dub.* 11 *H.* 6. 13. *Cont. Dy.* 304. *Acc. Mo.* 177. *R.* 1 *Sid.* 153. *R.* 2 *Mod.* 9. *Agreed per four J. two cont.* 1 *Lev.* 135. *Ray.* 163. *Semb.* 2 *Rol.* 335.

So, if land be devised to his executors, and he makes *A.* and *B.* his executors, who refuse; yet they may take the land. *R. Mo.* 594.

So, every one shall take as a devisee, who is named with such certainty that the person may be known, tho' he does not take immediately upon the death of the testator; as, a devise to one of the daughters of *B.* who marries to a *Norton* within 15 years; the first daughter, who so marries, shall have it. *R. Ray.* 82.

So,

So, a devise to a woman, when she marries, is good; and it shall descend to the heir till her marriage. *R. 1 Sid. 153.*

A devise to the heirs males of *B.* now living, and other heirs males and females of his body; a son of *B.* being godson to the devisor, shall take. *R. 2 Jon. 1000. 1 Vent. 334. 2 Vent. 313. 2 Lev. 232. Pol. 457. Carth. 155.*

A man having three daughters, devises to his wife till his heir be of full age, paying to his heir 10*l.*, to his other daughters 20*s.*, and afterwards gives to *B.* and *C.*, the younger daughters, so much, and if *A.* his heir dies, &c. it shall be a good devise to the eldest daughter. *R. 2 Lev. 162.*

[If a devise be to the heirs of the body of *A.* the elder of such issue, and *his*, *her*, and *their* heirs to inherit before the younger, and *his*, *her*, and *their* heirs, remainder over; if *A.* have no son, but two daughters, the elder daughter shall take an estate-tail in the whole, with remainder to the younger, and not in coparcenary. *2 Bl. Rep. 1002.*]

If *A.* having a son and seven daughters devises to a younger daughter for life, remainder to the son and the heirs of his body, (who dies without issue,) remainder to two other younger daughters for life, remainder to the next of his blood; the son of the eldest daughter shall have it. *Semb. Bridg. 15.*

So, tho' some part of the description be mistaken: as, if a devise be, *To Bevil Grandvill the 2d son of my 2d brother, who is my godson, and bears my father's name; B. G.* who was godson to the testatrix, the daughter of *Sir Bevil G.* took, tho' he was 2d son of *Bernard G.* who was 2d son of the 2d brother of the testatrix. *Per Master of the Rolls, H. 8 Ann, upon the will of Lady J. Thornhill.*

So, a devise to *Eleanor* daughter of *B.* who has several daughters, one named *Hellen*, but none *Eleanor*; *Hellen* shall take.

If a man devises to the heir of *N.*, and it be found by verdict that *P.* his son is reputed his heir; *P.* shall take tho' *N.* be an alien. *Semb. 1 Sid. 194. Vide post. (K).*

If he devises to *W.* eldest son of *Cha. W. of T.* and the eldest son is named *Andrew.* *R. Ch. R. 404. Per Weston, 3 Leo. 18.*

So, a devise to the mayor and governors of *B. hospital*; tho' it be not their corporate name. *3 Leo. 18.*

So, a devise to *A.* for life, and afterwards to the heirs male of the body of his grandfather; a son of the body of his grandfather shall take, tho' he be not heir general. *R. 2 Ver. 729. [Brown v. Barkham, in Canc. H. 3 G. Str. 35.]*

[A devise to the right heirs of husband and wife is a devise to such person as answers the description of heir to both, viz. a child of both. *1 Term Rep. 630.*]

A devise to the issue of *B. begotten*; all the issues take, tho' born afterwards. *R. 2 Ver. 545.*

A devise to *A. B.* if he be known by that name; tho' his true name is *W.* *Per And. Godb. 17.*

So, a devise to *B.* to the use of another, is good to the cestuy que use. *1 Leo. 254. Vide Uses (C).*

But it cannot be averred to be to the use of another. *4 Co. 4.*

And, if the cestuy que use refuses, the devisee shall not have it. *R. 1 Leo. 254.*

[Under

[Under a devise to all the children of *A.*, except *B.*, a posthumous child is entitled. *Clarke v. Blake*, 2 *Ves. jun.* 673.]

Vide post. (K).

(K) Who not.

BUT a devise to any *tanquam in esse*, where there is no such person *in esse* at the death of the testator, is void: as, a devise to such a chantry, and there is none such at his death, tho' it be afterwards erected, is void. 1 *Rol.* 609. l. 50. *Vide ante* (I).

A devise to the heir of *B.* who was an alien; for he cannot have an heir. *R.* 1 *Lev.* 59. 1 *Sid.* 194. *Vide ante* (I).

So, a devise to the heir of *B.* is void, if *B.* be living at the death of the devisor; for *non est heres viventis*. *R.* 1 *Lev.* 59. *Semb.* 1 *Sal.* 230. [*Acc.* 1 *P. W.* 399.]

[But a devise to the heir of the body of *B.* is good by way of designation, tho' *B.* be not dead at the time of the contingency when the devisee is to take. 2 *Bl. Rep.* 1010.]

Or, to the first son of *B.* when he has no son *in esse* at the death of the testator. 1 *Sal.* 229.

[But if a man devise his estate in case he leave no son at the time of his death, to *J. S.*, and die, leaving his wife *privement enseint* with a son, this posthumous son is a son living at the testator's death, and *J. S.* is not entitled. 1 *P. W.* 486.]

So, a devise of land or goods to *B.* is void, if *B.* dies in the life of the testator. *Pl. Com.* 345.

So, if a devise be to *B.* and his heirs; if *B.* dies, the heir shall not take, for he is named only by way of limitation. *R.* *Pl. Com.* 345. [4 *T. R.* 602.]

Or, to *B.* and the heirs of his body, and if he dies without issue, to another; if he dies in the life of the testator, his issue shall not have it. *R.* *Cro. El.* 423. *Per two J.* 2 cont. *R.* 2 *Ver.* 722. *Eq. Ca.* 115. *Per Ch.* 442. 452.

[But there is a distinction between an immediate devise to children, and a devise limited to them by way of remainder, or on a contingency uncertain in event; the first relates to children *in esse at the time*; the last extends to all that are *in esse at the time* when the devise vests. *Cowp.* 309. 314.]

[A devise to *A.* for life, then to his issue, and in default to *B.* and *C.* and their issue, and in default to the right heirs of *A.*; *A.* and *B.* die without issue in the lifetime of devisor; *C.* dies in the lifetime of devisor, leaving issue a daughter, who is also heir at law to *A.* The devise is void; she can neither take as issue of *C.* nor as heir of *A.* *Goodright v. Wright*, *H.* 3 *G. Str.* 25. 1 *P. W.* 397.]

[*A.* devised to *B.* and the heirs of her body, and for default of such issue then over; *B.* died in the lifetime of *A.*, and then *A.* by a codicil confirmed his will. It was holden that the heir of *B.* took nothing, though it appeared that *A.* knew of the death of *B.*, and of the birth of his son, before he made the codicil. *Doe v. Kett*, *B. R.* *E.* 32 *Geo.* 3. 4 *T. R.* 601.]

[If *A.* surrender copyhold to the use of his will, and then devises it to *B.* for life, and after his decease to the heirs of his body, and *B.* dies before the devisor, the heir can take nothing, for it is a devise

in tail to *B.* *His heirs* are words of limitation: *Bisby v. Greenplate*, T. 7 G. Str. 445.]

So, if a devise be to his four daughters and their heirs equally to be divided, and one has issue, and dies in the life of the testator; the devise shall be void for a fourth part. *Eq. Ca.* 116.

So, if a devise be to *A.* to the use of *B.*, and *B.* dies before the testator; the devise will be void. *R. 1 Leo.* 254.

But a devise to *A.* for life, remainder to *B.*, shall be good to *B.* though *A.* dies before the testator. *Pl. Com.* 344. b. *R. Dy.* 122.

If it be to *A.* and the issue of his body, remainder to *B.*, and *A.* dies before the testator, leaving issue, *B.* shall have it. *Cro. El.* 423. *R. 2 Ver.* 723.

If to *A.* and *B.* and their heirs, and *A.* dies in the life of testator, *B.* shall take the whole. *R. Cart.* 4. 1 *Co.* 100. b. *Act.* 1 *Sal.* 238. 1 *Ver.* 425. *F. g.* 231.

So, a devise to the eldest son of *A.*, remainder to *B.*, and *A.* has no son; *B.* shall take. *R. Mod. Ca. in Eq.* 4. (2d Part of 2 *Mod. Ca.*)

So, a devise to *A.* in trust for *B.* shall be good, tho' *A.* dies before the testator. *Dub. 2 Ver.* 468.

A devise of 300 *l.* to *A.*, with a direction *that he shall give it B. when he dies, or sooner*, shall be good, tho' *A.* dies in the life of the testator. *R. 2 Ver.* 467.

If money be devised to *A.*, *B.*, and *C.*, and if any of them die within age, his part to the survivor; it shall go to the survivor, tho' the person died before the testator. *R. 2 Ver.* 611. 653.

If a devise be of lands, to trustees for *A.* and *B.* till full age, and then to convey to them; though *A.* dies before the time comes for the conveyance, the conveyance shall be to his heir. *R. 2 Ver.* 562.

If a devise be to *A.* and *B.* in common, and *A.* dies in the life of the testator; his moiety is void. *Eq. Ca.* 157. (2d Part of 2 *Mod. Ca.*)

Or, to *A.* and *B.* jointly for life, and to their heirs in common; the inheritance to *A.* shall be void. *R. Eq. Ca.* 159, 160. *Ibid.*

[Under a devise of the surplus of personal estate to relations, only such shall take who are capable of taking under the statute of distributions. 1 *P. W.* 273. *Ibid.*]

So, a devise, so uncertain that it cannot be known who was intended as devisee, is void: as, if a devise be to *A.* for life, and that it shall remain to his issue, when he has several; the remainder is void. *R. Cro. El.* 742. *Denied*, *Ray.* 83. *Cont. Pol.* 106. *R.* that by a devise to the issue of *B.* all the issues take for life. 2 *Ver.* 545.

[If a devise be to *A.* by name, with a description annexed not applicable to *A.*, but shewn by parol evidence to be applicable to *B.*, so that it is uncertain which was intended, the devise is void; and no parol evidence can be admitted to shew, that previously to the making of his will the deviser had declared that he intended to leave the premises to *A.* *Thomas v. Thomas*, *B. R. E.* 36 *Geo.* 3. 6 T. R. 671.]

[But parol evidence may be admitted to shew that the name of *A.* was inserted by mistake for the name of *B.* *Ibid.*]

So, a devise to his son, when he has several. *Cro. El.* 742. *Semb. Ray.* 82.

So,

So, a devise to 20 of the poorest of his kin, shall be void; for it is not known who is poorest. 1 Rol. 609. l. 12. [Vid. 1 P. W. 327. a remarkable case of the manner in which poor relations shall be interpreted in a will.]

So, a devise *melioribus hominibus de B.* Cro. El. 743.

So, a devise to his right heirs of his name and posterity; where a daughter, his heir, is not of his name, and his brother is not his heir. R. Mo. 860. Hob. 29.

[So, no one shall take under a devise to certain persons under a general description, who was not *in esse* at the time of making the will: thus, under a devise of personal estate to his children and grandchildren, a grandchild *in ventre sa mere* at the testator's death, shall not take. 1 P. W. 342.]

[But had it been to the children and grandchildren living at the time of his death, perhaps the construction might have been extended to a grandchild *in ventre sa mere.* Id. *ibid.*]

[Lands are devised to B. for life, and after his decease, to all and every such child or children of B. as shall be living at the time of his decease; a posthumous child of B. shall share equally with those who were born in his lifetime. Clarke v. Clarke, C. P. H. 35 Geo. 3. 2 H. Bl. 399.]

[An infant *in ventre sa mere* is considered as born, for all purposes which are for his benefit. *Ibid.*]

So, a devise to the heir at law, of the same estate which he would take by descent, is void; for the descent shall be preferred. 1 Rol. 626. l. 30. Hob. 30. 1 Sal. 242. Vide *Discent* (A).

Tho' it be devised to the heir, subject to a charge; for that does not make an alteration of the estate. R. Lut. 798. Vide *infra*.

Or, subject to a contingency upon which another shall have it; for it descends in the mean time. Semb. Lut. 798.

So, a devise by him in remainder in fee, of the same estate, which the devisee would take by descent, shall be void. 1 Sal. 233.

But if the devise gives the estate to the heir in another quality, he shall take by the devise: as, if the devise be to co-heirs to hold jointly, or in common. R. 1 Leo. 315. R. Cro. El. 431. R. Bend. pl. 63. Vide *Assets* (B).

Or, to an heir upon condition to pay debts, and for non-payment, to another. R. Cro. Car. 161. Cont. per Holt, for the heir takes by descent, and, upon failure of payment, the other shall have it by way of executory devise. Mod. Ca. 241. Per two J. acc. 2 Mod. 286. R. cont. Lut. 798. 1 Sal. 241. Vide *supra*.

If the deviser has two daughters, and devises to the son and heir of one, he shall take the whole by the will. R. 1 Sal. 242.

If he devises the whole to one daughter, she takes the whole by devise. Per Dod. 2 Rol. 352.

So, if he in reversion devises an estate to others, in the same words by which it was limited to them by a prior settlement; the devise shall be good, for the tenure is thereby varied. R. 1 Sal. 233.

[If tenant in tail devises the lands to A., and gives B. a legacy, and B. claims the land as remainder-man, he cannot have the legacy. Kirkham v. Smith, T. 1749, 1 Vesey, 258.]

(L) What Things may be devised.

BY the *statutes* 32 & 34 H. 8. a man may devise all his lands, tenements, rents, and hereditaments: *Vide ante*, (A—B—G—H 1, &c.)

So, if a man has a rent for him and his heirs for the life of B., he may devise it. *Dub. Cro. El.* 805. *Mo.* 625.

So, an interest, tho' it be in contingency, may be devised. *R. 2 Rol.* 129.

[So, a possibility coupled with an interest. *Jones v. Perry*, B. R. H. 29 Geo. 3. 3 T. R. 88. C. P. T. 28 Geo. 3. 1 H. Bl. 30.]

Vide post. (M).

(M) What not.

BUT a devise of lands, of which a man is joint-tenant, is void. *Vide ante*, (H 7.)

Or, which he has in his politic capacity. *Vide ante*, (H 6.)

So, a man cannot devise lands, which he has not at the time of his making, or republishing his will; for the statute says, *having lands may devise*. 3 Co. 30. 1. [Salk. 237. 11 Mod. 129. Cowp. 90. 305.]

And therefore, if a man devises all his lands in A., and afterwards purchases other lands there; the new purchase does not pass, without a new publication. *R. Pl. Com.* 344. *Vide ante*, (E 3.)—*Post.* (N 21.)

So, if he devises all lands, which he has or shall have at the time of his death. *Dub. Lut.* 736. *R. 1 Sal.* 237. *F. g.* 225. 234.

Yet if he devises a reversion after an estate for life, or in tail, and that comes to his possession; the land passes. *F. g.* 231.

So, if a disseisee, before entry, devises his land, the devise is void.

Or, be afterwards disseised, and dies before entry. 1 Mod. 217.

If an infant, *feme-covert*, &c. devises, and does not republish after full age, or the coverture dissolved, it will be void. *F. g.* 226. *Vide ante*, (E 3.—H 2, 3.)

Tho' the lands are devisable by custom; for he ought to be seised at the time of his will. *F. g.* 226. 228. 243.

So, if a man devises all his chattels, a term for years, afterwards purchased, does not pass. *Semb.* 1 Sal. 238. *F. g.* 228, 9.

Yet if A. devises the manor of D., and afterwards purchases it, and dies; the devise will be good, though he had it not at the time of making the will. *Pl. Com.* 344. a. *Cont. per Holt*, *F. g.* 230.

So, if a disseisee by will devises land, and afterwards enters upon it; the devise will be good. 1 Sal. 237. *F. g.* 230.

If he in remainder devises, and afterwards the tenant for life dies; his devise will be good. 1 Sal. 237.

So, if a man devises a manor, and a tenancy afterwards escheats; it passes by the will. 1 Sal. 238.

[Under a devise of a manor, copyhold premises, parcel thereof, which were purchased by and surrendered to the lord subsequent to the time of his making his will, will pass; and this notwithstanding a subsequent demise of the premises by the devisor from year to year. *Hale v. Webb*, B. R. T. 36 Geo. 3. 6 T. R. 708.]

So,

So, if he who has an estate only by estoppel, devises; it will be good against parties or privies to the estoppel. *Semb. Jon. 457.*

So, if a man devises his personal chattels, goods afterwards purchased pass. *1 Sal. 237, 8.*

When a void or defective devise shall be aided. *Vide Chancery, (3 A 1, &c.)*

What goods and chattels cannot be devised. *Vide Chancery, (3 Y 5.)*

(N) Devises, how expounded.

(N 1.) What Words make a Devise.

[THE general rule which is laid down in the books, and on which alone courts can with any safety proceed, is to collect the testator's intention from the words he has used in his will, and not from conjecture. It is not necessary that any technical or artificial form of words should be used in a will, but we must collect the meaning of the testator from those words which he has used, and cannot add words which he has not used. *Per Ld. Kenyon Ch. J. Hay v. Coventry, B. R. H. 29 Geo. 3. 3 T. R. 85. 473.*]

Any words, which shew the intent of a devisor to dispose, are sufficient for a devise: as, if he says, *I release all my lands to A. and his heirs.* *R. Bend. 30. 1 And. 33. 2 And. 13. Vide Chancery, (3 Y 7.)*

I will my feoffees shall stand seised to the use of A. *1 Rol. 611. l. 10.* Tho' they cannot stand seised to such use. *R. Dy. 323. 1 Rol. 611. l. 15.*

Tho' he had not any feoffees of that land; for his intent appears, that A. shall have the land. *R. 1 Rol. 611. l. 20. Mo. 280.*

A. B. did declare, that his brother and his heirs should be heir to his land, being written by a stranger, and signed by A. B., was sufficient. *R. 1 Sid. 362.*

If A. covenants to levy a fine of land to such uses, and does not levy it, but by his will confirms all estates granted by such deed; it will be a good devise, tho' only intended to be granted. *R. 1 Sal. 225.*

If he says, *My younger son shall grant a rent out of such land to B.;* it is a devise of the land to the younger son. *2 Rol. 478.*

I promise to entail the land to B. and the heirs of his body, &c. amounts to a devise. *R. 2 Rol. 478.*

A devise to A. and his heirs, to the intent that he permit B. to take the profits for his life, and after his death to stand seised to the use of the heirs of the body of B., will be a devise executed in B. in tail. *R. Lut. 824. Sal. 679.*

So, if a man devises the rents and profits of land; the land itself passes. *Vide 1 Sal. 228.*

Or, gives authority to A. to take the profits of the land until he be paid 400 l. *Al. 45.*

Or, devises that A. receive the rents by the hand of his executor; it will be a devise to the executor in trust for A. *Per two J. Holt cont. 5 Mod. 63. 103, 4. Said to be, per two J. cont. Holt acc. 1 Sal. 228.*

Or, that his executor shall have the rents and profits for the maintenance

nance of his children until the full age of his son; it will be a devise to the executor. *R. Cart. 25.*

But a devise that his executor shall sell, does not amount to a disposition, but gives an authority only. *Mo. Ca. 111.*

So, if *A.* devises lands to his son at the age of 24, and that *B.* shall have in the mean time the oversight and dealing of the said lands; *B.* has only an authority. *R. Mo. 774.*

A devise of money to his wife, to pay for land, which with land in *A.* is eslated on my wife, and is in full of her jointure, is not a devise of the land to her. *R. per three J. Powel cont. 2 Vent. 57. 3 Lev. 259.*

[If a father makes a will, and is considering the situation of his affairs, and gives his son a legacy, desiring he will do an act for his sister's benefit; it amounts to an obligation on the son as far as the value of the father's estate, and has often been construed an absolute devise. *Blount v. Doughty, P. 1747, 3 Atkyns, 481.*]

(N 2.) By what Words, Lands, &c. pass in a Devise.

What description is sufficient to pass lands in a grant. *Vide Fait, (E 4.)—Grant, (E 1, &c.)*

In a devise such description, by which the intent of the devisor may be collected, is sufficient: as, if a man devises 20 *l.* a-year out of his lands, without saying what part; the devisee shall take so much in common with his heir. *Lit. 218. Dy. 280. b. in marg.*

[If a man having purchased "all that messuage or tenement with the appurtenances in *M.* then in his own possession," with the words, "and hereinafter more particularly mentioned and described, that is to say, 2 closes of meadow, and 6 acres of arable;" afterwards by will give "the above-said messuage lying in *M.* with all houses, barns, stables, stalls, &c. that are upon or belong to the said messuage." This is sufficient to pass the land as appurtenant to the messuage. *2 Bl. Rep. 726.*]

[So, land occupied with an house, and highly convenient for the use of it, will pass in a will by the word *appurtenances*, tho' held for a different term. *2 Bl. Rep. 1148.*]

[And by the bequest of a house, it is in general presumed that the testator meant to pass every thing which was occupied with it, as proper and convenient for the occupation of the house, tho' the word *appurtenances* be not added. *2 Term. Rep. 502.*]

[And every thing shall be presumed to pass which in common parlance may be supposed to be comprehended under the words of the devise: as, where *A.* being tenant for years of a house, gardens, stables, and coal-pen, bequeathed in the following words; "I give the house I live in and gardens to *B.*" the stables and coal-pen passed without being expressly named, though the testator used them for the purposes of trade, as well as for the convenience of his house. *2 Term. Rep. 498.*]

[Lands usually occupied with a house will not pass under a devise of a "messuage with the appurtenances," unless it clearly appears that the testator meant to extend the word "appurtenances" beyond its technical sense. *Buck v. Newton, C. P. T. 37 Geo. 3. 1 Bos. & Pull. Rep. 53.*]

If he leases land for 10*l.* rent, and as concerning the disposition of all his lands and tenements devises his rent of 10*l.* in A. to his wife; she shall have the land itself by this devise. *R. 2 Cro. 104. Mo. 771.*

Tho' by the same will he devises other land which was in lease, by the name of his land. *Vide Mo. 772.*

[If a man devise that his cousin A. shall continue to live at his house, and be at the charge of keeping it; and the servants and coach horses which the testator employed in plowing the ground, and spend the corn arising thereon in the house; the land enjoyed with the house shall pass to the cousin. *1 P. W. 603.*]

So, if he devise a house and direct by will, that an annuity of 1200*l.* per ann. be paid to his cousin, and that she shall maintain her son there; if the son choose to go from her, still the cousin shall have the 1200*l.* per ann. in the same manner as if the son had died. *Id. 604.*]

[If a man seised of the reversion in fee of houses let on ground-rents, begins his will by saying, it is to dispose of all his worldly estate; and devises all his ground-rents in parcels to his children, and their heirs and assigns for ever, except to his eldest, to whom he gives a small legacy, and declares he is to have no more share or portion than that; the reversion passes by the devise. *Maundy v. Maundy, T. 8 G. 2. Str. 1020. B. R. H. 142.*]

[So a devise of leasehold ground-rents arising from an under-building lease, passes the leasehold reversion. *1 Brown Ch. Rep. 76.*]

If he devises all his lands; fee-farm rents, issuing out of those lands, and which were afterwards purchased by the devisor, pass. *R. Eq. Ca. 78. (2d Part of 2 Mod. Ca.) Vide infra.*

If A. has the reversion of tithes after the death of B., and devises all his fee-simple lands to his brother, if his wife has not a son, but a daughter, and dies, having no other tenements; the reversion of the tythes passes. *R. 1 Rol. 614. l. 7.*

[If a man, having freehold and leasehold tythes, the latter being perpetually renewable without fine, give all his tythes, the leasehold will pass. *1 Brown Ch. Rep. 78.*]

So, if he devises all his real estate, copyhold lands pass. *R. Eq. Ca. 78. (2d Part of 2 Mod. Ca.)*

[If a man having freehold and copyhold lands in D. devises all his lands, &c. in D. in trust to pay his debts, &c. the freehold only shall pass, unless he has surrendered to the use of his will, for that shews his intention; or unless the freehold is not sufficient, for then equity will supply the want. *Hastlewood v. Pope, T. 1734, 3 P. W. 322. Tendril v. Smith, M. 1740, 2 Atkyns, 85.*]

[If a man seised of a manor in D. devises all his lands and hereditaments in D. the manor, a hereditament, shall pass. *Sed Q.* If he had lands there also. *Hastlewood v. Pope, T. 1734, 3 P. W. 322.*]

[If a man devise all his freehold houses in A., having none but leasehold houses there, the leasehold shall pass; otherwise in a grant. *1 P. W. 286.*]

[If a man has only leasehold, and devises all his estates, the leasehold passes. *Knotsford v. Gardiner, M. 1742, 2 Atkyns, 450.*]

[If he has lands in fee, and lands for years, and devises all his lands and tenements, the fee-simple lands only pass. *Ibid.*]

[But if all his freehold lands are settled upon his wife, to whom

he so devises, the leasehold will pass, for otherwise he gives her nothing. *Semb. Ibid.*]

[If a man seised in fee, and possessed by lease for 21 years, of lands in *D.*, devise all his lands whereof he is seised, *possessed*, or wherein he is any way interested, to *A.* for life, remainder to *B.* in tail, remainder to *C.* for life, with power to make a jointure, remainder to trustees to preserve contingent remainders, &c. the leasehold shall pass as well as the freehold. 2 *P. W.* 456. *Vid. Ambler*, 356.]

[But if he be seised of lands in fee in *A.*, and possessed of an extended interest on a statute in *B.*, and devise all his lands, tenements, and real estate in *A.* and *B.* to *J. S.* and his heirs; this will not pass the extended or chattel interest in *B.*, especially if there be another clause in the will, which, *inter alia*, disposes of all the testator's debts or credits. 3 *P. W.* 26.]

[A man being entitled to a reversion of certain estates in the counties of *Oxford* and *Wilts*, devised all his estate in certain lands in the counties of *Glocester* and *Worcester*, and *elsewhere in the kingdom of England*; it was held that by the latter words the reversion passed. *Corop.* 363.]

[If a man having only copyhold in fee, and a long term of years in the parish of *A.*, devise all his estate in *A.*, after the decease of his wife, to his niece and her heirs; this will carry both these interests to the niece, though there be also a bequest of all his goods, chattels, and personal estate to his wife. 2 *Bl. Rep.* 1301.]

If he devises *his rents*, or *lands mentioned in such a deed or writing*, it will be good. *R.* 2 *Cro.* 145.

[If a man settles lands on his son, &c. in tail-male, and being seised in fee of the reversion of them, and in possession of other land, devises all his land, &c. in three parishes (by name) and *elsewhere*, not by him formerly settled, or thereby disposed of; the reversion in fee will pass, tho' of greater value than the lands named, and tho' his son's daughters have not a proper provision. *Chester v. Chester*, *T.* 1730, 3 *P. W.* 56.]

If he devises *all his lands* (having land in possession, and land in reversion after an estate for life) to his executors for ten years, and then to sell for payment of debts, and the estate for life ceases; they may sell the land in reversion. *R.* *Cro. El.* 525. *Ow.* 155. *Vid.* 1 *Term Rep.* 105.

[Where a man devised his freehold and copyhold estate, and part of the copyhold consisted of a malt-house and brew-house, which were let with the plant and utensils; it was held that the plant and utensils passed. *Ambler*, 395.]

If a man devises to *A.* for life, and to enable his wife to pay his debts and legacies, devises *all his lands, tenements, and hereditaments not disposed of before, to his wife for ever*; the reversion of the lands devised to *A.* passes to the wife as an hereditament not before disposed of, tho' he had assets sufficient otherwise. *R. cont. in B. R.*, but the judgment was reversed and *R. acc. per all the Judges in the Exchequer-Chamber.* 2 *Vent.* 285. 3 *Mod.* 229.

If he devises a manor for six years, other land to *A.* in fee; and *all the rest of his lands* to *B.*; by this the reversion of his manor passes. *Al.* 28. *R.* 1 *Lev.* 212. *Adm. Mod. Ca.* 111.

If he devises several legacies, and afterwards such and such lands,
and

and all the rest of his goods, monies, and other estate whatsoever, to his executor, having other lands: those pass to the executor. *Ca. Ch.* 262.

If he devises all his real and personal estate fee-farm rents pass. *R. Mod. Ca.* 107. 1 *Sal.* 237. *Vide supra.*

So, if it be, all the residue of his real and personal estate. *Mod. Ca.* 108.

[So, if he devises "all he is worth," this will pass real as well as personal estates. 1 *Brown Ch. Rep.* 437.]

Tho' it be accompanied with words, which denote the personal estate only. *Mod. Ca.* 108.

[If a man makes his will.—"As to my temporal estate, I bequeath to T. (testator's heir at law) 50*l.*" (then gives several legacies); "and all the rest and residue of my estate, goods, and chattels whatsoever, I give and bequeath to my wife, whom I make full and sole executrix." This is a devise of his real estate, *per King C.*, and in fee-simple, *per Talbot, C.* on re-hearing. *Tanner v. Morfe, T.* 8 G. 2. *C. T. T.* 284.]

[If a man after several devises of lands to his wife, and to others, gives all the residue of his goods, &c. together with his real estate not before devised, to his wife; the inheritance of lands not mentioned passes. *Ridout v. Pain, P.* 1747, 3 *Atkyns*, 486. 1 *Vesey*, 10.]

[So, does the reversion in fee of lands before devised to her for life, tho' said to be given her because her jointure was not sufficient for her to live hospitably upon. *Ibid.*]

[Under a devise of the residue of real estate, reversions not otherwise specifically disposed of, will pass. *Vid.* 2 *Bl. Rep.* 737.]

[But where a reversion is specifically devised, tho' to testator's own right heirs, it is an exception out of the general residuary clause. 2 *Bl. Rep.* 739. *Cowp.* 420.]

[Unless under special circumstances, which would prevent the residuary clause from being satisfied, unless the previous devise to his own right heirs were rejected as nugatory and void. 2 *Bl. Rep.* 737.]

[If a man devise certain lands to trustees, in case his personal estate shall not be sufficient for the payment of debts, in aid of it; and all the rest, residue, and remainder of his real and personal estate, to his wife; if the personal estate prove sufficient, the lands devised in aid pass to the wife by the residuary clause; if the personal prove deficient in part only, the wife is entitled to what remains of the real, after supplying the deficiency. *Cowp.* 43.]

[A man, seised of lands in C. and G. in fee, of other lands in A. and B. for lives renewable for ever, and of other lands under leases for 3 lives, with reversionary terms for 21 years, from the death of the surviving life in each; and being himself the surviving life in one, devises thus: As to all my worldly substance, I give to my mother, my house and land in G. with the appurtenances, during her natural life, clear of any deduction; and also my lands of C. (subject to a rent payable thereout) for life, without liberty of committing waste thereon; and after several legacies to relations, (one of whom was his heir at law,) he devises to his mother, all the "remainder" and "residue" of all his "effects" both "real" and "personal," which he shall die possessed of: notwithstanding the restrictions in the former part, for her natural life, and without liberty of committing waste, the mother, by the residuary

duary clause, takes a fee in all the testator's fee-simple estates, and the whole of his interest in the rest of his real property, subject to the charges thereon. *Cowp.* 299.]

[The word *legacy* is not confined to pecuniary legacies, but may extend to devises of land. *Hope v. Taylor*, P. 30 G. 2. 1 B. M. 268. 5 Term Rep. 716. *Infra*, p. 391.]

Yet if a man devises *all his lands to A. and B. and their heirs, as tenants in common*, and afterwards *all the residue of his real and personal estate to D. and his heirs*; A. dies before the testator; his part does not go to D. but to the heir of the testator. *Dub. 2 Mod. Ca.* 124. 221. 224, 225.

So, if any part of the description is certain, it is sufficient tho' the other part fails: as, if he devises *his corner-house, in the tenure of A. and B.*, and A. only has it. *R. Cro. Car.* 447. 473. 1 Rol. 613. l. 51. *Jon.* 379.

Or, if he has a corner house in the possession of A. and another house adjoining in the possession of C. and devises *his corner-house in the possession of A. and C.*, the corner-house only passes. *R. Cro. Car.* 447. *Jon.* 379.

If he devises *his tenement with its appurtenances in which H. dwelleth in B.*, land appurtenant, though out of B., passes. *R. Cro. El.* 113.

So, if the words may be ascertained by a thing to which they refer, it is sufficient: as, if a man, by deed, covenants upon the marriage of his son, to levy a fine to the use of G. his son in tail, &c. and afterwards by his will says, *I ratify to G. all those my estates granted in marriage, &c.* tho' no fine was levied, whereby the conveyance was void, yet the lands pass to him in tail by the will. *R. 4 Mod.* 132. 1 Sal. 225.

If A. contracts with B. for land, and takes a conveyance of it from C., and afterwards devises *all the land purchased of B.*, it will be a good devise of those lands. *R. 1 And.* 188.

[If a man having lands in A. enters into a treaty for the purchase of other lands in B., but before the agreement is reduced into writing makes his will, and devises all his lands in A. and elsewhere in England, and afterwards proceeds, and has an estate in equity in the lands in B. before his death; these lands pass by his will. *Potter v. Potter*, P. 1750, 1 Vesey, 437.]

So, if the words are joined to another sentence, and governed by a verb of it, they shall be ascertained by it; as, if a man devises *Black-acre in fee to A., and also Whiteacre*; he shall have a fee in Whiteacre. 1 Sal. 235.

If he devises *all his estate in his term, and also B.*, (in which he had an inheritance,) the devisee shall have a fee in B. *Per three J. Holt cont.* 1 Sal. 234.

If he devises land in A. to B. and the heirs of his body, and devises to him land in D. and also land in S., then devises land in F. *to hold the last devised premises to him and the heirs of his body*; he shall have an estate-tail in the lands in D. and S. as well as in F. *R. 1 And.* 160. 1 Leo. 57. Sav. 80.

So, if there be a sufficient description, it shall not be controlled or restrained by an imperfect explanation afterwards: as, if a man devises *all his tenements in A. to trustees, to pay his debts till B. attain 21, and afterwards all the same tenements, viz. Two parts of N. tenement for* such

such a purpose, and the third part for such, and then to *B.*, but says nothing of *U.* tenement; yet that passes to *B.*, for he has before given all to him. *R. 4 Mod. 141.*

If a man devises *all his messuage in which N. dwells called the Swan*; tho' *N.* had only three rooms, the whole messuage passes: for the name of *the Swan* ascertains the whole. *R. Cro. Car. 129. Jon. 195.*

[*A.* by will gave two legacies of 150 *l.* each to his son and daughter to be paid at 21; then he gave all his realty and personalty to his wife for life, and after her death one freehold estate to the son, and the other to the daughter, "but if either or both of his children should die before the wife, then *those legacies* which were left to them should return to the wife." It was holden, that on the death of the son before the mother, the mother was entitled to the reversion of the freehold estate. *Hardacre v. Nash, B. R. T. 34 Geo. 3. 5 T. R. 716.*]

[The word "*legacy*" may be applied to a real estate, if the context of the will shew that such was the testator's intention. *Ibid. Hope v. Taylor, B. R. E. 30 Geo. 2. 1 Burr. 268.*]

[*A.* being seised of several freehold estates, and possessed of part of a farm held by a church lease renewable, (the other part of the farm being freehold, and the whole having always been let together as one entire farm at one rent,) devised "all his manors, messuages, houses, farms, lands, woodlands, hereditaments, and real estates whatsoever," to *B.*; and gave "all the rest and residue of his ready money, rents in arrear, stock in the public funds, jewels, and personal estate whatsoever" to *C.*; and it was holden that the leasehold part of the farm passed under the first devise. *Lane v. Earl Stanhope, B. R. T. 35 Geo. 3. 6 T. R. 345.*]

(N 3.) By what, not.

But where words in a devise are express, they shall not be extended by implication: as, if a man has an house and land in *A.* and a house and land in *B.*, and devises *his house and land in A., with all his other lands, meadows, and pastures in B.*, this does not extend to his house in *B.* *R. Cro. El. 476. 658. Mo. 359. Ow. 75. Vide post. (N 12, 13.) (Mo. 559. reports this cont. and so 2 Rol. 49. l. 53. 50. l. 4. but 2 Rol. 57. l. 25. and 2 And. 123. acc.)*

If he has land named *H.* in *A.* and *B.*, and devises *his land in A. called H.*; so much as lies in *A.* only passes. *R. 2 Cro. 22.*

[By a devise of a house *cum pertinentiis*, only the garden and orchard will pass with it; but by a devise of a house *with the land appertaining thereto*, the land usually occupied therewith will pass. *1 P. W. 603.*]

So, if he devises it *to his son, and if he dies without issue, then he devises H. generally to his daughters*; that which lies in *A.* only passes to the daughters, for no more was devised to the son. *R. per three J. 2 cont. 2 Cro. 22. Cro. El. 674.*

If he has land in *A.* and *B.* in *Wales*, and mortgages of land in other counties in *Wales*, and devises *his lands in A. and B. or elsewhere in Wales*, to *D.*, and the residue of his personal estate to his executor; the mortgages do not pass to *D.*, for the words, *or elsewhere in Wales*, extend to little parcels out of *A.* and *B.*, but not to lands of another nature. *R. 1 Ver. 4.*

If *A.* has 100 acres of land named *Jacks*, and lets an house and

60 acres of his land to B. and then devises to his wife *the said house and all his land named Jacks, in the possession of B., only the 60 acres pass.* 2 *Leo.* 226. *Vide post.* (N. 13.)

If A., tenant for life, remainder to his son in tail, remainder to himself in fee, devises *all his lands, &c. to trustees, to raise portions for his daughters; and if his son dies without issue, all, except A., B., and C. to one daughter, and A., B., and C. to another daughter; and whereas he had other lands which his father desired his cousin should have, he requested his brother to provide for that: those other lands do not pass to the first daughter, but descend to both the daughters, upon the death of his son without issue.* R. *Skin.* 631.

So, general and uncertain words shall not be extended by construction: as, if a man gives *all to his mother*; this does not amount to a devise of his lands. R. *Ray.* 97. 1 *Sid.* 191. 1 *Lev.* 130.

If he devises *the manor of B. to A. and his heirs, and his manor of C. to S. for life, and if he dies, living A., to him who has his manor of B.; afterwards A. sells the manor of B., then S. dies; A. shall not have the manor of C.* R. 1 *And.* 306.

[If a man on shipboard, entitled to a considerable leasehold estate by the death of his father, to which he did not know he had a right, make his will at sea, and devise to his mother, if living, his rings, making one of his ship-mates his executor, to whom he bequeathed his red-box, *and all things not before bequeathed*; this will not pass the leasehold interest to which the testator did not know he was entitled, but shall be restrained to things *ejusdem generis.* 1 *P. W.* 302.]

If he devises to A. *for life, and afterwards exitui suo*, and he leaves a son and a daughter; the remainder does not go to both, but shall be void for the uncertainty. R. 2 *And.* 134.

If he says, *I make A. executor of all my goods, lands, and chattels*; it shall not be a devise of lands, tho' he has no chattels real. R. *Eq. Ca.* 137.

So, a devise to a wife, of so much money to pay for lands purchased of A. which are settled upon the wife for her jointure, when they are not settled, shall not be a devise of the lands themselves. R. *per three J. Powel, cont.* 3 *Lev.* 259. 2 *Vent.* 56.

[If a man possessed of leasehold, and seised in fee of freehold, charges all with payment of debts, and devises to his executors the leasehold, in trust to sell and pay the debts, and if not sufficient, then he devises, "that his executors (his two sons and daughter) shall and "may absolutely sell, mortgage, or otherwise dispose of his freehold, "for payment of such debts, &c. as leasehold would not; and after "payment devises it to trustees in trust," &c. No estate passes to the sons and daughter, but only a power to sell, &c. *Lancaster v. Thorton, T.* 33 & 34 *G. 2.* 2 *B. M.* 1027.]

So, general words shall not be extended beyond words of an inferior species, which precede them: as, if a man devises *his land to A., and all his goods, chattels, estates, mortgages, debts, &c. to B.,* the word *mortgages* does not extend to mortgages in fee not forfeited. 1 *Rol.* 834. l. 46. (*N. B. Jon.* 380. and *Cro. Car.* 447. 449., where the case is reported, mention the mortgages as *forfeited*, tho' *Rol. Ab.* states them otherwise.) It extends to give them only for life. *Jon.* 380. 1 *Rol.* 834. l. 46. *Cro. Car.* 447. 449.

So, *estates* being subsequent to goods, does not amount to a devise of a fee in the land. R. *Jon.* 380. *Cro. Car.* 447. 449. So,

So, a devise of all his *lands, tenements, and hereditaments*, does not pass mortgages in fee, tho' forfeited. *R. 2 Ver. 625.*

Though he afterwards forecloses them, or gets a release of the equity. *R. 2 Ver. 625.*

But words, which otherwise can have no effect, tho' accompanied with words of an inferior nature, shall not be rejected; as, if a man devises *the rest of his goods, lands, and moveables to his children*; lands of which he was seised in fee, pass for life. *R. Mo. 594.*

So, where the words of a will are express, they shall not be avoided in favour of the heir at law. *2 Ver. 340.*

[The testator, having given 4000 *l.* to *A.* and *B.* in trust for certain persons, by a residuary clause gave "all the rest of his estate and effects of what nature soever to *A.* and *B.*, their executors and administrators, in trust, to add the interest to the principal, so as to accumulate the same, it being his will that the residue should not pass but at the time and in the manner as the principal sum of 4000 *l.* was directed to be paid." It was holden that a house, the only freehold of which the testator was seised, did not pass by the will, notwithstanding there were general words in the introductory clause, "as to all his estate and effects both real and personal." *Spearing v. Puckner, B. R. E. 36 Geo. 3. 6 T. R. 610.*]

[*A.* having an estate of his own in the county of *B.*, and another in *C.*, and having also the legal but no beneficial interest in an estate in *D.*, with power of appointing it to either of his sons, by will devised "all his estates of what nature or kind soever in the county of *B.*, and at — in the county of *C.* or elsewhere in the kingdom of England, after payment of his debts, &c." to a younger son. It was holden that the trust-estate, which he had the power of appointing, did not pass by this general devise. *Reade v. Reade, B. R. H. 39 Geo. 3. 8 T. R. 118.*]

What passes by a devise *cum pertinentiis*, or as incident, *vide in Grant*, (E 9. 11.)

(N 4.) What Words pass a Fee.

Words which shew an intent that the devisee shall have a greater estate than for life, and do not limit an estate-tail, make a fee, tho' there be not the word *heirs*. [*Cowp. 356.*] *Vide post.* (N 6.)

As, if a man devises land to *A.* *in perpetuum*, he shall have a fee. *R. Cro. Car. 129. Jon. 195. 1 Rol. 834. l. 10. Co. L. 9. b.*

Or, to *B.* *habend. sibi & suis*. *R. Bend. pl. 9.*

Or, to *B.* and his assigns for ever. *1 Rol. 834. l. 15.*

To *B.* and his heir, in the singular number. *1 Rol. 832. l. 40.*

[The testator, *F. Eagle*, devised thus, "to my brother *Thomas* for life, then to the nearest of my relations, *ff.* to *B.* the son of *Thomas*, and his heirs for ever; and after their deceases to the nearest of kindred to me, first male and then female; the house, &c. to descend to the name of *Eagle*, to be kept up as long as the world shall endure, and never to be sold;" and holden that *B.* the son of *Thomas*, took a fee. *Preston v. Funnell, C. P. T. 12 & 13 Geo. 2. Willes, 164. 7 Mod. 8vo. edit. 296. S. C.*]

To *B.* & *sanguini suo*. *1 Rol. 834. l. 17.* But this is only an estate-tail. *Per Holt Mod. Ca. 110.*

To

To B. and his successors. 1 Rol. 835. l. 15.

So, if he devises to B. to dispose at his will and pleasure. 1 Rol. 834. l. 12. R. Mo. 57. Bend. pl. 9.

Or, to give to his children. Mod. Ca. 111.

To dispose of to which of his children he pleases; for he may dispose in fee. Dub. 2 Lev. 104. and afterwards R. acc. per threa J. Vau. cont. that he may dispose of the fee. 1 Mod. 189. Cart. 232. 1 Sal. 240. Semb. Jon. 137. Latch, 939.

[Devise to A. (the heir at law) for life, then to her issue, if none, to dispose at her will and pleasure; A. never has issue, a fee passes. Goodtitle v. Otway, T. 26 & 27 G. 2. 2 Wils. 6.]

To make provision for his children. Mod. Ca. 110.

Upon trusts which are perpetual. R. 2 Mod. Ca. 255. 382.

[A devise to trustees, and the survivor of them, (without the word heirs,) in trust for others, in tail and in fee, passes a fee to the trustees. Shaw v. Weigh, P. 1 G. 2. Str. 798. Fort. 58.]

[A fee will pass without the word heirs, where a trust of land can be satisfied no other way. Villers v. Villers, M. 1740, 2 Atkyns, 71.]

[So, wherever any thing is directed to be done, which, strictly speaking, an estate for life only, may not be sufficient to answer, the court will imply a fee. Per Ld. Mansfield C. J. Loveacres v. Blight, B. R. M. 16 Geo. 3. Cowp. 356.]

So, if he devises to B., paying a sum in gross. 1 Rol. 834. l. 8. 2 Mod. 25. R. 6 Co. 16. a. R. Cro. El. 204. Bro. Testament, 18. Bro. Estates, 78. 2 Ver. 106. R. 1 And. 38. R. 2 Cro. 591. 599. R. 2 Cro. 527. [Salmon v. Denham, C. P. M. 6 Geo. 1. Com. 323. Moone v. Heafeman, C. P. H. 12 Geo. 2. Willes, 138. Cowp. 356.]

[Under this devise "I give my house and furniture to A., whom I make executrix, she paying all my debts and legacies, A. takes a fee. Willey v. Holmes, B. R. M. 39 Geo. 3. 8 T. R. 1.]

Or, paying so much out of the profits to A. for life, and 20 s. per ann. to B. for life. R. 2 Rol. 80. Vide post. (N 7.)

Or, in consideration that he release a debt. R. Bend. pl. 19. 1 And. 35. 2 And. 13.

Or, to pay his debts. Dy. 371. b. R. Bend. 37. Cont. Dal. 13. R. acc. Ca. Ch. 196. [Cowp. 356.]

Or, paying a rent out of it perpetually. 1 Rol. 835. l. 30. R. Sal. 685.

Or, paying so much per ann. tho' less than the annual rent, if there be a possibility of loss thereby. R. 2 Mod. 25. Pol. 399. R. Cro. El. 378. [Salmon v. Denham, C. P. M. 6 Geo. 1. Com. 323. Baker v. Stocker, B. R. M. 33 Geo. 3. 5 T. R. 13. Andrew v. Southouse, B. R. T. 33 Geo. 3. 5 T. R. 292.]

Or, that he allow maintenance to A. for his life; for he ought to allow it immediately. R. 2 Jon. 107. Pol. 545.

So, if he devises 10 l. per ann. and devises legacies of 120 l. to be paid out of it within a year; for they cannot be paid out of the annual profits. R. 2 Lev. 249. 2 Jon. 113. but reported cont. Pol. 553. [Cowp. 356.]

So, if he devises the rest of his goods and land to A. to discharge all things charged in his will; A. shall have a fee. 1 Ch. R. 191.

[So, if he devises all the rest, residue, and remainder of his lands, "hereditaments," goods, chattels, and personal estate, "his legacies" and funeral expences being thereout paid," it conveys the fee of all the

the devisor's real estate. *Doe v. Richards*, B. R. T. 29 Geo. 3. 3 T. R. 356.]

[But a devise of all testator's real and personal estate to *A.* and *B.*, to be equally divided between them, or to the survivor of them, paying his lawful debts, and after their decease to the heir male, gives *A.* and *B.* only a conditional estate for life. 2 Bl. Rep. 1215.]

So, if he devises to *A.* for life, and then to a son of *A.*, except *A.* purchases land of the same value for his son, and then *A.* shall sell; *A.* does not purchase, &c. the son has a fee; for purchase in the 2d clause imports an absolute purchase. R. 1 Rol. 833. l. 50. 2 Cro. 599. Hob. 65. Vide infra.

So, a devise, that his executor shall purchase 100 l. per ann. for his son, gives him a fee. 1 Rol. 834. l. 5.

So, a devise to *A.* if he releases a debt to the devisor's executor. 1 And. 35. 2 And. 13.

So, a devise to three daughters, and if one dies before the others, one to be heir to the other, gives a fee. R. 1 Rol. 833. l. 45. Vide post. (N 7.)

So, if he devises to *A.* and if he dies under age to the heirs of the devisor, *A.* has a fee; for when he gives it to his own heirs, if *A.* dies under age, it imports that the heir of *A.* shall have it, if he does not so die. 2 Sand. 388.

So, if he devises to *A.* but if his father purchases other land of like value, to another, *A.* has a fee; for purchase imports a fee, and to the value, ought to be to the value of the whole estate. R. Hob. 65. 1 Rol. 834. l. 5. 835. l. 20. Vide supra.

So, if he devises to *A.*, and if he aliens, that it shall revert, and says that he shall pay 3 l. to *B.* and his heirs. R. Cro. El. 745.

So, if a man devises to another all his lands of inheritance. R. Mo. 873.

All his tenant right estate in such land. R. 1 Mod. 100. 2 Lev. 91.

So, all his estate. R. 3 Mod. 45. R. 1 Rol. 835. l. 5. R. Mod. Ca. 109. 1 Sal. 237. [Vid. 1 Term Rep. 411. 2 P. W. 335. 524. 2 Eq. Caf. Abr. 313. 3 Wils. 414. Cowp. 306. 355. 659. Doug. 763. Caf. T. T. 157. 2 Atk. 38.]

[All the rest of his estate. *Cliffe v. Gibbons*, M. 1 G. 2. Ld. Raym. 1324. in Chan.]

[So, all my interest. *Right v. Sidebotham*, B. R. T. 21 Geo. 3. Dougl. 763.]

[If testator devise, "As to my temporal estate, I bequeath to my nephew *I.* (testator's heir at law) 50 l., and after other legacies, all the rest and residue of my estate whatsoever I give to my wife *M.*, whom I make full and sole executrix;" an estate in fee-simple passes. *Tanner v. Morse*, T. 7 G. 2. C. T. T. 284. 3 P. W. 295.]

[But now it is held that the word "estates" is equivalent to "estate," and will pass a fee unless coupled with other words, which shew a contrary intention. 2 Term Rep. 656.]

[By a devise of the residue of real and personal estate, in trust for testator's younger son till he attain 21, and then the trust to cease; the younger son takes the fee. *Ambler*, 387.]

[But introductory words, "as touching the disposition of all my temporal estate," or the like; will not alone cause a devise of certain houses to *A.* without any further disposition of the same, to be construed an estate in fee-simple. 2 Bl. Rep. 889. Cowp. 352. 657.]

[But connected with other words in the body of the will which manifestly shew the testator's intention to pass a fee, they will. Cowp. 352. 660. Vid. id. 808.]

[Tho'

[Tho' the word *estate*, and even with a locality, *in* or *at*, passes the whole interest of testator; as well as the lands; yet if it adds, *in the occupation of A.*, or if it is *estates*, (in the plural,) it is not certain that the fee passes. *Goodwyn v. Goodwyn*, *H.* 1748, 1 *Vesey*, 226. 1 *Eq. Cas. Abr.* 178. pl. 19.]

[If a will begins, "As to my temporal estate, I give," &c. and then gives several legacies to *A.*, and directs *A.* to sell any part of real or personal for payment of debts and legacies, and concludes, "all the rest of my goods and chattels, real and personal, moveable and immoveable, as houses, gardens, tenements, &c. I give to *A.*" without using the word *estate*, or any words of limitation, a fee passes. *Grayson v. Atkinson*, *M* 26 *G.* 2. 1 *Wilf.* 333.]

[*A.* by his will reciting, "as to such worldly estate as God has pleased to bless me with," made a provision for his heir at law, and devised "all the rest and residue of his goods, chattels, rights, credits, personal and testamentary estate whatsoever, to *B.* for his own use, benefit, and disposal." Under this clause *B.* took an estate in fee in the lands of the testator. *Smith v. Coffin*, *C. P. E.* 35 *Geo.* 3. 2 *H. Bl.* 444.]

[A devise of "all the rest and residue of my estate, of what nature or kind soever," includes real as well as personal property, though accompanied with limitations peculiarly applicable, and usually applied to personal property alone. *Doe v. Chapman*, *C. P. E.* 29 *Geo.* 3. 1 *H. Bl.* 223.]

[*A.* devised his real and personal estates to his wife for life, and directed part of the personalty to be sold after his wife's death by the executor, and divided between *C.*, *D.*, *E.*, *F.*, and *G.*; he then gave two annuities to *H.* and *I.* to be paid by his executor out of his whole estate, and to commence after his wife's death; and he then devised, "the remainder of the profits after his wife's death, and after the yearly payments to the annuitants, out of his whole estate, to *B.*, *C.*, and *D.*, equally, share and share alike." It was holden that the executor took a fee. *Buzley v. Woodhouse*, *B. R. M.* 31 *Geo.* 3. 4 *T. R.* 89.]

[I give to my wife all my money, plate, &c. and all my goods, chattels, and personal estate, real or personal; and I further devise to my said wife and her heirs, such part of all my real estate that I have any power to dispose of by will; passes a fee to the wife. *Hurst v. E. Winchelsea*, *M.* 33 *G.* 2. 2 *B. M.* 880.]

Or, his whole estate paying debts and legacies; if his personal estate be not sufficient for the debts. *R.* 1 *Roll.* 834. l. 30.

So, if he devises to *A.* for years, and that *A.* shall have the inheritance, if the law will allow it. *R.* *Hob.* 2.

So, if he devises to *A.* for life, and afterwards all my lands, tenements, and hereditaments not before disposed of, to *B.*, this gives the reversion of the lands before devised to *B.* in fee. *R.* 2 *Vent.* 285. *Carth.* 50. *R.* 2 *Ver.* 560.

Or, all the rest and remainder of my estate to *B.*; this gives the reversion of the lands before disposed of, and the other lands not disposed of, to *B.* in fee. *Semb.* 4 *Mod.* 90. 3 *Mod.* 228. *R.* 2 *Ver.* 564. *R.* *Eq. Ca.* 92. (2d Part of 2 *Mod. Ca.*)

So, if he devises his lands in *A.* to one, and all his other lands, tenements, and hereditaments, to his brother; also I give to my brother all my goods, chattels, &c. and whatsoever else I have in the world, &c. these last words give him a fee. *R.* in *C. B. T.* 8 *An. inter Hopewell* and *Ackland*, *Com.* 164. 1 *Sal.* 239. 2 *l'er.* 687. [If

[If a man gives *A.* a particular limited estate in one part of his will, and then gives him all the residue of his real estate, (and there are no restrictive words,) the fee passes. *Ridout v. Pain*, P. 1747, 3 *Atkyns*, 486. 1 *Vesey*, 10.]

So, if he devises to *A.* for life, and the whole remainder to *B.*, and if *B.* dies under age, to *C.* and his heirs; *B.* has a fee. *R. Lut.* 764.

Or, devises the fee-simple to *A.*, and after his death to *B.* for life; *A.* has the fee after the death of *B.* *R. Dy.* 357. 2 *Rol.* 425. *Bend. pl.* 293.

So, if he devises all his estate real and personal for payment of his debts and legacies. *R. Ca. Ch.* 196.

[*A.*, after directing payment of debts, says, *Item*, "in default of issue of my own body, I give lands to *B.* in trust to pay annuities till my debts are paid, and after all my debts, &c. (except the annuities) are satisfied, I give the lands to *C.*" &c. *A.* dies a bachelor. *B.* takes a fee determinable when the purpose of paying debts is performed. *Willington v. Willington*, H. 8 G. 3. 4 *B. M.* 2165. 1 *Bl. Rep.* 645.]

If he devises the fee of his estate to a woman for life, and afterwards to her son generally, the son has a fee. *R. 1 And.* 51.

[If he devise his estate at *N.* to *A.* in tail, remainder to *A.* in fee, if he survive *B.* his wife; but if *B.* survive *A.*, then the said estate and premises (subject to an annuity to *B.* for life) to *C.* This is a fee-simple in *C.* 2 *Bl. Rep.* 938.]

[But a devise of a trifling pecuniary legacy to the heirs at law, jointly with other grandchildren of the testator, and to be paid on a future contingency, will not turn a devise in remainder to *A.* generally into a fee-simple. 2 *Bl. Rep.* 1045. *Vide post.* (N 7.)]

If he devises *Blackacre* to *A.* for life, and all his lands not before disposed of to *B.*; the reversion passes to *B.* in fee. *R. 2 Ver.* 461.

[If *A.*, by settlement tenant for life of part, and tenant in tail of other part, the reversion of the whole to him in fee, devises all his lands and hereditaments out of settlement to his nephew; the reversion passes. *R. 2 Ver.* 623.]

[Devise of a farm to *A.* for life, remainder to her daughter *B.*, she paying to each of her sisters, *C.* and *D.*, 500*l.*; if either of them die, the survivor to have the legacy; if *B.* die, the farm to be divided between the survivors; and in case all three die before *A.*, then to the heirs of *A.* for ever. It was holden that *C.* and *D.* were each entitled to a moiety of the farm in fee on the contingencies of their surviving their mother (*A.*), and of their sister (*B.*) dying before she paid their legacies. *Moone v. Heafeman*, C. P. H. 12 Geo. 2. *Willes*, 138.]

So, if the latter part of the devise, "in case all three die before *A.*, then to *A.*'s heirs," had not been added. *Ibid.*]

[*A.* having an only child *B.*, (a daughter,) devised lands to a child with which his wife was then enſient, if a male, but if a female, then the lands were to be divided between *B.* and that female; and if they both died without issue, then to *C.* in fee. The child was born, and was a male; and it was holden that he took a fee either by the will or by descent. *Davies v. Hamlin*, C. P. H. 19 Geo. 2. *Willes*, 612.]

Vide post. (N 6.)

(N 5.)

(N 5.) What Words make an Estate-Tail.

If a man devises land to another *and his issues*; this makes an estate-tail in a will. 1 *Rol.* 835. l. 47. if he has no issue alive. 1 *Vent.* 229. *Vide Estates*, (B 3, &c.)

Or, to another *and his heirs male*; for the law supplies the words, *of his body*. *Co. L.* 25. b. *Per two J.* 27 *H.* 8. 27. a.

So, to another *and his children*, if he has no child living. *R.* 6 *Co.* 17. a. *Mo.* 397.

To another *and the fruit of his body*. *R.* *Mo.* 637.

To A. *and his heirs legitime procreatis*. *Mo.* 637.

[To a man *for and during his natural life*, and after his decease to his heirs and assigns for ever, and *for want of such heirs*, to another and his heirs; the first takes an estate-tail. *Cowp.* 234.]

[Devise to A. and her heirs, and if she died without issue, then she was enabled to dispose of the estate by will or deed; and for want of such issue and direction, &c. then to the devisor's right heirs; A., who had issue, took an estate-tail. *Neville v. Rivers*, B. R. E. 37 *Geo.* 3. 7 *T. R.* 276.]

[Devise to "A. and B. and their heirs for ever, provided that if "both have issue, then both their dividends to go to the issue of their "own bodies; but if but one have issue, then the premises to go to "that issue," &c.; it was holden that A. and B. took estates-tail. *Doe v. Whichels*, B. R. E. 39 *Geo.* 3. 8 *T. R.* 211.]

To the heirs male of the body of B. now living; the son of B. (who was the person designed to take) takes an estate-tail. *R.* 2 *Vent.* 313

To A. *and the heir male of his body*, in the singular number. *R.* *Cro. El.* 313. *Cont.* if it be, to the eldest issue male. *R.* *Sav.* 75.

To A. *and his issue male*. *Cro. El.* 40.

So, if a devise be to A., *and if he dies without issue, to another*; A. has an estate-tail. *R.* 3 *Mod.* 123. *R.* 1 *Rol.* 837. l. 3. *Per Hale*, 1 *Vent.* 230. [*Vid.* 1 *P. W.* 605, 606.]

[So, to a man and his sons in tail male, and in failure of such issue male, remainder over, the devisee having no issue at the time; this gives the father an estate in tail male. 2 *Bl. Rep.* 1083.]

To a man *and the heirs of his body lawfully to be begotten, and their heirs for ever*; but in case the father shall die *without leaving issue of his body*, then over; is only an estate-tail, notwithstanding the words, *their heirs for ever*. *Cowp.* 410.]

[So, when a man devised "the fee-simple and inheritance to A., and his child or children for ever, when he shall be 21 years of age; but if he die before that time, then the fee-simple and inheritance to B.; A. takes only an estate-tail. *Davie v. Stevens*, B. R. H. 20 *Geo.* 3. *Deuyl.* 321.]

[If A. devises to B. his wife all his lands not in jointure, and then says, "if she has no child by me, and for want of such issue, then "said premises to return to my brother," &c. B. takes an estate-tail by the first words, which cannot be controlled by subsequent provisions. *Wyld v. Lewis*, *P.* 1738, 1 *Atkyns*, 432.]

So, a devise to A., *and if he dies not having a son, &c.* A. takes in tail male. *Per Peeph.* *Mo.* 682. 1 *Vent.* 231.

So,

So, a devise to *A.*, and if he marries and has issue male, his son shall have it; and if he has no issue male, *B.* shall have it. *R. 9 Co. 127.*

So, a devise to *A.* for life, and then to *B.*; and if *A.* and *B.* and his heirs die, and his sister survives them, she shall have it; *B.* has an estate-tail. *R. 2 Cro. 416.*

A devise to *A.* and such heir of his body as shall be living at his death, and in default of such, the remainder to another; *A.* has an estate-tail. *R. 2 Ver. 325.*

[Devise to *A.* for life, and after to his heirs male of his body, and his heirs for ever, and for want of such heir male, to *B.*, is an estate-tail in *A.* *Lisle v. Pullin, M. 13 G. Str. 729. Ld. Raym. 1437. [Vid. 1 P. W. 142.]*

[By a devise to *A.* for life, without impeachment of waste, and after his decease to the issue male of his body, and to the heirs and assigns of such issue male for ever; and for default of such issue male to *B.*, &c., *A.* takes an estate-tail. *Webb v. Puckey, B. R. T. 33 Geo. 3. 5 T. R. 299.*]

[*A.* devised to his nephew *B.*, but if he died without male heir, then to another nephew *C.* and his heirs; and charged the estate with an annuity to *D.*, and several legacies to other persons, payable at a future time. It was holden that *B.* took an estate-tail. *Slater v. Slater, B. R. T. 33 Geo. 3. 5 T. R. 335.*]

[*A.*, after giving different annuities to an only son, increasing at different ages till 30, and to be paid to him till he married, devised thus: "In case my son shall happen to marry before he attain the age of 30, then I give and devise to him, and the heirs of his body, all my real and personal estates, &c.; and if my son shall happen to die without leaving issue of his body, then I give and devise the same to my brother *B.*;" it was holden that the son took an estate-tail in the real estates, and the personalty absolutely. *Daintry v. Daintry, B. R. T. 35 Geo. 3. 6 T. R. 307.*]

[Testator devised "all his freehold and leasehold estates" to *A.* in fee, provided that if *B.* shall have "any son or sons," then "to such male issue as *B.* shall have when *A.* attains twenty-one," but *A.* to have the rents and profits of the estates till he attains twenty-one; by a subsequent clause he gave "all the residue of his real and personal estates whatsoever, not before disposed of, to *A.* and his heirs for ever." *B.* had one son who died before *A.* attained twenty-one, and a second who was born three weeks after that period; and it was holden that the first son took nothing, but that the second took an estate in tail male. *Whitelock v. Heddon, C. P. E. 38 Geo. 3. 1 Bos. & Pull. Rep. 243.*]

[Devise to *A.* and his assigns for his life natural, of reversion of lands expectant on the death of another, and after determination of that estate, to trustees for his life to preserve contingent remainders, and after his death to the heirs of his body, with remainders over, is an estate-tail in *A.* *Coulson v. Coulson, H. 13 G. 2. Str. 1125. 2 Atk. 246. 1 Ves. 142. Dougl. 337.*]

So, a devise to *A.* for life, and after his death to the heirs of his body, gives an estate-tail, executed in *A.* *R. Cart. 171. R. 2 Lev. 58. R. 1 Rol. 836. l. 50. R. Lut. 824. Sal. 679.*

Or, to *A.* for life, and after his death to the men-children of his body. *R. Mo. 397. Bend. 30. [Dougl. 431.]*

[If a man devises to *A.* for life, and after his death to the use of the

the issue male of his body, and the heirs male of the body of such issue male, *A.* takes an estate-tail. *Roe v. Grew*, *H. 7 G. 3. 2 Willf. 322.*]

Or, to *A.* for life, and afterwards to his heir male. *Per Popb. Mo. 397. Cart. 171. 2 Ver. 325.*

[If a man devises a remainder to his son for life, and his heirs male, with remainders over, the son takes an estate-tail. *Dubber v. Trollop*, *M. 9 G. 2. B. R. H. 160.*]

To *A.* for life, and if she marries after his death and has heirs of her body, then the heirs shall have it. *1 Rol. 839. l. 32.*

To *A.* for life, and if she marries after his death and has an heir of her body, to such heir and the heirs of his body; and if *A.* dies without issue, to another: *A.* has an estate-tail. *Dub. Cro. El. 313. Cont. Mo. 593. Dub. Ow. 148.; but it is badly reported. 1 Rol. 839. l. 35. 2 Rol. 417. l. 25.*

To *A.* for life, and after his death to the heir male of his body. *R. 1 Vent. 232. 2 Rol. 253. l. 50.*

To *A.* for life, and after his death to the issue of his body by a second wife. *Per Hale*, but two *J.* cont. *1 Vent. 225, &c. R. in the Exchequer-Chamber. 2 Lev. 58. 61. Pol. 111.*

To *A.* for life, remainder to the next heir male, and for default of heir male, to *B.* *R. 1 Vent. 230.*

To *A.* for life, and afterwards to the next heir of his body for life, &c. *Semb. cont. 1 Leo. 257.*

[But a devise to trustees to pay, after deducting rates, taxes, and repairs, the residue to *C. S.* and his assigns for life, and after his decease, to the use of the heirs male of the body of *C. S.*, and in default of such issue, remainder over, does not give *C. S.* an estate-tail, because the trustees, being to pay the taxes and repairs, have an interest in the premises, and the legal estate for the life of *C. S.* is in them. *1 Brown Ch. Rep. 75.*]

[Yet by a devise to his wife for life, remainder to trustees, to preserve contingent remainders, remainder to *A.* for life; remainder to trustees, remainder to the heirs of her body, remainder over, with a declaration that *A.* should only have an estate for life; *A.* takes an estate-tail. *1 Brown Ch. Rep. 313.*]

So, a devise to *A.* and his heirs, and if he dies without issue, to *B.*, gives *A.* but an estate-tail. *R. Cro. El. 525. R. 2 Cro. 290. Bridg. 1. Tel. 209. R. 2. Cro. 22. 1 Rol. 835. l. 40. 836. l. 17. R. Ray. 453.*

So, a devise to *A.* and his heirs, and if his sister survives him and his heirs, to the sister in fee: for it appears that it was intended heirs of his body, for he cannot be without an heir-general when his sister survives. *R. 2 Cro. 416. Mo. 853. 3 Bul. 195. 1 Rol. 836. l. 10. Cont. per three J. two acc. Cro. Car. 58. Hut. 85. R. Acc. T. 12 W. 3. B. R. inter Nottingham and Jennings, 1 Sal. 233. (Com. 82.) [Brice v. Smith, C. P. E. 10 Geo. 2. Willes' Rep. 1. Com. 539. 2 Eq. Abr. 317. pl. 32. S. C.]*

[The deviser, having devised his lands to his wife for life, added these words in his will: "if my son *R.* (the eldest) happens to die "without heirs, then my son *J.* shall enjoy my lands;" and it was holden that *R.* took an estate-tail. *Goodright v. Goodridge*, *C. P. M. 16 Geo. 2. Willes, 369.*]

So,

So, a devise to *A. and his heirs, and for want of heirs of him, to B.*, if it be proved that *B.* was his cousin. *R. 3 Lev. 71.*

[*A* testatrix devised a messuage and lands to her eldest daughter *A.* and the heirs of her body for ever, and for want of such issue, to her 2d, 3d, and 4th daughters successively in tail, charged nevertheless with 180*l.* to be levied out of the first annual profits, and to be divided equally among the three younger children; and from and immediately after the payment of the said sum, by *A. or her heirs*, then that *A. and her heirs* should enjoy the said messuage and lands for ever: the word *heirs* in the two last clauses shall be taken to be the same kind of heirs as in the first, viz. heirs of the body. *Cowp. 833*]

But a devise to *A. and his heirs, and if he dies without an heir, to a stranger*; *A.* has a fee. *Agr. 2 Cro. 416. R. Cro. Car. 58. Dy. 4. a. Cont. Dy. 4. a. in marg. R. acc. 1 Sal. 238.*

So, to *A. and his heirs, and other land to B. and his heirs*; and if *B.* dies without issue, living *A.*, to *A.*; and if both die without issue, to *D.* *1 Rol. 839. l. 25.*

So, to *A. and his heirs, paying 100*l.*, and if he dies after the 100*l.* paid, without issue, to B.*, is a tail, and *B.* shall have the remainder, though *A.* dies before payment. *R. Ray. 426.*

So, if a devise be to *A. and the heirs of his body, and after the death of A.*, that his son *B.* shall have it; yet *A.* has an estate-tail. *R. Mo. 593. Bend. pl. 244. 1 And. 33.*

Or, to *A. and the heirs of his body, and if he dies in the life of B.*, then his brother shall have it; his brother shall not have it, if *A.* dies in the life of *B.*, if he does not die without issue. *R. Cro. Car. 185.*

So, if the words be, if *A.* dies before he has issue during the minority of *B.* *R. Mo. 127.*

Or, if he dies without heirs before 21, so that the estate falls to his sister. *R. 2 Lev. 162.*

So, if a devise be to *A.* (his younger son) and his heirs, and if he dies without heir, to his own right heirs; *A.* has but an estate-tail: *R. 1 Sal. 233.*

So, if a devise be to *A. and the heirs of his body by a second wife*; it shall be an estate-tail, though he has a wife living. *1 Vent. 228.*

To *A. and the heirs male of her body, provided that she marries and has issue male by a man of the name of S.*, shall be a special tail to her and her heirs male by any of that name. *R. Sal. 570.*

[To *A.* and *B.* for their lives, equally to be divided, and after their deceases, to the heirs male of their bodies equally to be divided, and if either of them die without issue, then to the survivor for life, and to the heirs male of his body; it is an estate-tail. *Thrustout v. Peake, M. 3 G. Str. 12.*]

[To *A.*, *B.*, and *C.*, and to the survivor and survivors of them, in trust for my sisters *D.* and *E.*, equally betwixt them during their natural lives, without committing waste; and if either of my said sisters die, leaving issue or issues of her or their bodies lawfully begotten, then in trust for such issue or issues of the mother's share; or else in trust for the survivor or survivors of them, and their respective issue or issues; and if both my said sisters die without issue as aforesaid, and their issue or issues die without issue or issues lawfully to be begotten, then in trust for *F.*, &c. is an estate-tail to the two sisters, with cross remainders. *Shaw v. Weigh.* On error in the House of Lords;

reversing judgment in error in *B. R.* Ten lords to seven. *Eyre, Pengelly, and Fortescue* *A.* for reversing, the other nine judges for affirming. *Fort.* 58. *Str.* 798.]

So, if a devise be to *A.* and his heirs, and other land to *B.* and his heirs, and that the survivor shall be heir to the other, if either of them dies without issue; *A.* has an estate-tail. *R.* 2 *Cro.* 695.

So, a devise to three daughters, and if any of them die before the others, one shall be heir to the other, and if the three daughters die without issue, to *B.*; the daughters have an estate-tail. *R.* 1 *Rol.* 836. *l.* 25. *R. Mo.* 864.

Or, to two sons for life, and afterwards to their sons and their heirs, and that the one shall be heir to the other, and if both die without issue, to *B.*; the two sons have estates-tail. *R.* 1 *Rol.* 836. *l.* 40.

[So, if a devise be to *A.*'s three son's successively in tail-male, remainder to all and every other son of *A.*, without naming any estate; remainder, for want of such issue, to *B.* in tail-male; the other sons of *A.* take an estate in tail-male. 3 *Bur.* 1570. 1 *Bl. Rep.* 499. 521.]

So, if a man devises that land shall descend to his son, and that his executor shall take the profits till his son dies without issue, and if he dies without issue, that the whole shall remain, &c.; the son has an estate-tail. *R.* 1 *Rol.* 839. *l.* 40.

So, if a devise be to *A.* for life, and afterwards to the heirs male of the body of *A.* now living; a son of *A.*, then living, takes in tail. *R.* *Pol.* 457. 2 *Vent.* 313. 2 *Jon.* 100.

So, if a devise be to *A.* and the heirs of his body for 500 years: it shall be an estate-tail, and not a term. *R.* *Mod.* 773. *R.* 2 *Cro.* 62. 1 *Co.* 87. *Semb.* to be but a term for years, but no resolution. Cited to be a term for years. 1 *Rol.* 741. *l.* 47. 2 *Rol.* 424.

So, if a devise be to his wife for life, if she do not marry; but if she marries, to *A.* and the heirs of his body, remainder to *B.* the second son in tail, remainder to *C.* the third son in tail; *A.* the eldest son has an estate-tail, tho' the wife does not marry: for the intent appears to entail the estate, and the words shall be transposed for that purpose. *R.* 3 *Lev.* 125. *Ray.* 428.

[If *A.* devises lands to his wife for life, then to his son *H.* for life, then to his son *G.* and his heirs for ever; and if he dies without heirs, then to his two daughters *K.* and *I.*; it is an estate-tail in *G.* *Tyte v. Willis, M.* 7 *G.* 2. *C. T. T.* 1.]

[If *A.* give to trustees two long annuities, one for *D.* for life, remainder to *D.*'s son, remainder to the issue male of his body, remainder over; and the other to his son *E.* for life, and in default of issue male, remainder to *C.* for life, to his issue male in tail-male, to *D.* for life, to *D.*'s son for life, remainders over; and make *C.* executor; *E.* dies without issue male; the son of *C.*, born after testator's death, dies, and his father administers; *C.* joins with *D.* in sale of the first long annuity, and *D.* receives the money. As to the second annuity, there being words of limitation, such as would create an estate-tail in real estate, on the birth of *C.*'s son, the whole interest in remainder after *C.*'s death vested in him, and *C.* is absolutely entitled to it as his administrator. As to the first annuity, *C.* and *D.* shall replace it to *D.*'s son, and *C.* may have relief against *D.* *Ivie v. Ivie, P.* 1738, 1 *Atkyns*, 429.]

[If *A.* devises to trustees in fee till *B.* attains 21, and if *B.* attains

21, or has issue, then to *B.* and the heirs of his body; but if he die before 21, and without issue, then over. If *B.* attains 21, or has issue, an estate-tail vests in him, and the limitation over is a remainder which takes place on his death without issue; if he dies without issue before 21, it goes over by way of executory devise. *Brownsword v. Edwards, H. 1750, 2 Vesey, 243.*]

[If *A.* devises all his real and personal estate to trustees, to pay the rents and profits to *B.* for life, then to her son *C.* for life, then to pay them to the heirs of his body, and for want of such issue to the other sons of *B.* in tail, then to the daughters of *B.*, and for want of such, to convey to *D.* in fee; *C.* is entitled to a conveyance in tail of the real, and to the absolute property of the personal estate. *Garth v. Baldwin, T. 1755, 2 Vesey, 646.*]

[If an ordinary man makes his will of all his worldly, &c. gives several small legacies payable in 12 months, gives lands to *A.*, *B.*, and *C.*, not to be parted, but the rent to be parted between them, then to *C.* a house, &c. (without further limitation,) and declares, that if either of the persons before-named die *without issue*, the said legacy shall be divided between them that are left alive; *C.* has an estate-tail in the house. *Hope v. Taylor, P. 30 G. 2. 1 B. M. 268.*]

[Land purchased by money devised to be laid out in land shall be settled in the same manner as if the devise had been of land itself; therefore, if *A.* devise that all his money shall be laid out in land, and settled on his eldest son and the heirs male of his body, remainder to his second son, and the heirs male of his body, remainders over: *Chancery* will order the land to be settled in manner of the devise, and not in strict settlement, as in the case of marriage articles. *1 P. W. 290.*]

[But if the devise be to trustees, in trust to be laid out in lands, and settled on *B.* for life, without waste, remainder to trustees, and their heirs for the life of *B.* to support contingent remainders, with a power to *B.* to make a jointure, remainder to the heirs of the body of *B.*, remainders over: here *B.* shall be but tenant for life, with remainder to his first, &c. son. *2 P. W. 471.*]

[Otherwise, if lands had been devised to the same uses, for then *B.* would have had an estate-tail. *Id. ibid.*]

(N 6.) What not.

But if an estate be limited over after a death without issue upon a contingency, this does not make an estate-tail, but an executory devise; as, if a man devises to *A.* and his heirs, and if he dies without issue in the life of *B.*, to *B.* and his heirs: *A.* has a fee, and *B.* only a possibility. *R. 1 Rol. 835. l. 45. Bridg. 3. 2 Cro. 592. R. Dy. 354. a. Vide ante, (N 4.)—Post, (N 7.)*

So, if he devises to *A.* and his heirs, and if he dies before marriage, or within age and without issue, then to *B.* *R. 1 Rol. 135. l. 50. Hard. 150.*

If he devises to his wife, and if she has issue, to such issue, or if the issue dies within age, or before his wife, or if she has not issue, to *B.*; the wife takes only for life. *R. 2 Cro. 199. Vide post, (N 7.)*

A devise to a son for life, and after his death, if he dies without issue then living, to a daughter; the son takes but for life. *1 Vent. 231.*

So, a devise to A. for life, and if he has issue male, to such issue male and his heirs; and if he dies without issue male, to B. and his heirs; the issue has a fee, and not an estate-tail. R. 1 Sal. 224.

To A., B., and C., and if they live unto full age, and have issue, then to them and their heirs; and if they die without issue, to B., shall be a fee, and not an estate-tail. R. 2 Leo. 69. 3 Leo. 115.

So, a devise to A. and his heirs, and if he dies before 21, and without heirs of his body, to B. Dub. Hard. 148.

So, a devise to A. and the heirs male of his body, and if he dies without heir of his body, to B., will be only a special tail to A., and not a tail general. R. Mo. 13. 4 Mo. 318. R. Dy. 171. a. Bend. pl. 114. 1 And. 8.

So, if a devise be to A. and afterwards to his first son and the heirs of his body, then to his 2d, 3d, and other sons in the same manner, and for default of such issue, to B., &c.; and afterwards there is a memorandum, that A. do not alien from his heirs male, but that after default of such issue, the land shall remain to B. This does not restrain the first words; for the son of A. shall take in tail general. R. 3 Mod. 81. Pol. 657.

[But the words, for want of issue male, in this case, gives no estate-tail to A. himself. 1 P. W. 54.]

So, if a devise be to A. for years, and afterwards to the heirs male of his body, and for default of such issue, to B.; it shall not be an estate-tail to A. by implication, when by such construction his express estate for years will be merged. 1 Sal. 226.

So, if it was to A. for life, and afterwards to his 1st, 2d, and 3d son in tail-male; and if A. dies without heir male, to B.; it shall not be an estate-tail in A. R. 1 Sal. 236. 2 Ver. 450. 546.

Or, to his sisters A. and B. for life, and if they leave issues, to them or the survivors and their issues, and if his sisters die without issue, or, having issue, such issue shall die without issue, to D.; is only an estate for life in the sisters, with remainders in tail to their issues. R. 2 Mod. Ca. 382. 384. (This judgment was reversed in the House of Lords, tho' nine judges held it an estate for life, and three an estate-tail. Str. Rep. 805. Eq. Ca. Abr. 185.)

[If a man having an estate not within the statute *de donis*, (as an annuity in fee issuing out of the four one-half per cent. duty in Barbadoes,) gives a power by his will to his executors, to entail it on his daughter and her issue, and in case of her death, and failure of her issue, to divide it in moieties between his two nephews; his intention being, that it be made good to her for life, and to her lawful heirs for ever, and on failure thereof, to his two nephews, moietywise. As no remainder can be created of an estate not within the statute, it is void as to the nephews; and it must be settled to the daughter for life, and to the heirs of her body; which is a fee-simple conditional, with power, after issue had, to alien. *E. Stafford v. Bulkley*, H. 1750, 2 Vesey, 170.]

Vide post. (N 7.)

(N 7.) What Words make an Estate only for Life.

But if a man devises to another indefinite, he takes only for life. *Latch*, 40. Pol. 541. [Coup. 240. 355. 659. 841. Doug. 759.]

[To

[To make a devise of lands without any *limitation*, in *fee*, such a manifest intention must appear, that the testator *meant* to give a *fee*, as may satisfy the *conscience* of the court, in pronouncing it such. If it be barely problematical, the rule of law must take place. *Cowp.* 235.]

[*A.* devised two houses to his wife for life, and willed, that on payment of a sum of money by *B.* (one of his sons) to the wife, *B.* should share equally alike with his brothers and sisters, *C.*, *D.*, and *E.*; and if any of his children should die, then the share of him or her should go among the survivors; and it was holden that the children took estates for life only under the will. *Richardson v. Edmonds*, *B. R. E.* 38 *Geo.* 3. 7 *T. R.* 635.]

[If one devises all his lands, tenements and messuages whatsoever, after debts, legacies, and funeral expences paid, to his brother-in-law, he has only an estate for life. *Semb. Merfson v. Blackmore*, *T.* 1742, 2 *Atkyns*, 341. *Dougl.* 759.]

So, a devise to *A.* for life, and afterwards to his three daughters equally to be divided; the daughters take only for life. 1 *Rol.* 833. l. 40. 834. l. 35. *R. Mo.* 594. *R.* 1 *Ver.* 65.

Or, part to *A.* for life, the other part to *B.*, and after the death of *A.*, the whole to *B.*; he takes only for life. 1 *Rol.* 834. l. 20. *Vide ante*, (N 6.)

So, a devise to two sons and their heirs, and if either dies before marriage, or within age and without issue, the whole to the survivor; the survivor takes only for life. 1 *Rol.* 836. l. 5.

So, a devise to three daughters, and if one dies before the others, the one shall be heir to the other, gives but for life. 1 *Rol.* 836. l. 35. *R. cont.* 1 *Rol.* 833. l. 45. *Vide ante*, (N 4.)

So, a devise to a wife until *B.* attains 24 years; and if *B.* dies, to *A.*; *B.* takes only for life. *R.* 1 *Rol.* 836. l. 45.

So, if a man devises to *A.* for life expressly, remainder to his heir male and the heirs of his body, *A.* takes only for life. *R.* 1 *Co.* 66. b. *Cro.* 453. *R. Mo.* 593.

So, to husband and wife for their lives, remainder to their men-children, and they have a son in *esse*. *R.* 6 *Co.* 17.

Or, to *A.* for life, remainder to the sons of his body. 1 *Rol.* 837. l. 10. 1 *Vent.* 231.

Or, remainder to his issue, where he has two sons in *esse*. *Cont. Cro. El.* 742. 734. for the remainder is void for the uncertainty: but *Hale semb. acc.* 1 *Vent.* 229.

["I appoint *A.* heir for life of all my estates, and after his death " to his son *T.* and his heirs male for ever; but if *T.* should die " without issue, then to his next heir male for ever, the elder to be " preferred before the younger; and if no male issue left behind said " *A.*, then the estate to devolve to the females; and if no females, then " *A.* to give and dispose of the same as he shall think fit." *A.* had, at the time of making the will, *T.*, who died soon after testator, and a daughter who had another son, *S.*, who was then dead, but testator knew it not. *A.* takes an estate for life, daughter in tail-general, and remainder in fee is vested in *A.* *Fell v. Fell*, *P.* 13 *G.* 3. 3 *Wils.* 399.]

So, to *A.* for life, and that he may dispose to which child he pleases.

R. 1 Mod. 189. *Latch*, 40. R. 3 Leo. 71. *Vide infra*. [*Vide* 1 P. W. 149.]

[So, if a man devise all his estate to his wife; and in case of death happening to her, he desire his executors to take care of the whole for his daughter; the wife shall take only an estate for life, with remainder in fee to the daughter. 1 *Brown Ch. Rep.* 489.]

So, if a devise be to A. generally, and to his issues or children, where he has children living; it will be but an estate for life. *Per Hale*, 1 *Vent.* 229.

[A. devised his estates real and personal "in trust to trustees for his brother B. and his first and every other son in tail-male, on failure of such issue, to his brother C. and his first and every other son in tail-male," &c. &c. in all the foregoing cases, without impeachment of waste other than wilful, and directed the renewals of a leasehold estate to be made "by the tenant for life;" it was holden that B. took only a life-estate, with remainder in tail to his children. *Phipps v. Mulgrave*, B. R. T. 33 Geo. 3. 5 T. R. 320.]

[Only an estate for life passes under these words, "all the rest of my lands, tenements, and hereditaments, either freehold or copyhold, and also all my goods, &c. after payment of my just debts and funeral expences, I give to A.," &c. *Moor v. Mellor*, B. R. E. 34 Geo. 3. 5 T. R. 558. 6 T. R. 175.]

[The word *hereditament* alone is insufficient to pass a fee. *Ibid.*]

[The testator, after these introductory words, "as touching such worldly and personal estate wherewith it has pleased God to bless me," gave an estate for life to his wife in his estates in A. and B., and then devised to J. W. "all his lands freehold, copyhold, and leasehold in A. Also, he devised to J. W. all his estate freehold and copyhold in B.;" held, that J. W. took only an estate for life in remainder in the estate in A. *Child v. Wright*, B. R. M. 39 G. 3. 8 T. R. 64.]

[Devise to A. for life, then to the children of A. successively, and their heirs, and if A. die without issue, then to B. (son of the elder brother of A.) in fee, it was holden that A. took only an estate for life. *Ginger v. White*, C. P. T. 16 Geo. 2. *Willes*, 348.]

[Devise to "A. for life, and then to his male children for their lives, and so to the male children descending from them, on their decease or failure, then to B. and the heirs male of his body for the same term of life, and upon the same terms as the deviser intended for A. and his male children, and in case of B. and his male children failing, then to C. and his male children for the same term of his and their life, and upon the same terms." Held that A. took an estate for life only, and that on his death without male issue, B. took an estate for life only. *Croft v. Woodhall*, C. P. M. 19 Geo. 2. *Willes*, 592.]

[If a man devises to his wife for life, then to his son and his heirs lawfully begotten, viz. the first, second, &c. successively, lawfully to be begotten by his son, and the heirs of the body of such first, second, &c. son, according to seniority; and in default, to the right heirs of testator; the son has only an estate for life. *Law v. Davis*, M. 3 G. 2. *Str.* 849. *Ld. Raym.* 1561.]

To A. and his eldest issue male; tho' he has no issue living. R. Cro. El. 40. 1 *And.* 132. To

To his wife until his daughter and heir attain 16, and if the daughter dies, B. shall be her heir; the daughter takes only for life. *Per two J. 3 Leo. 55.*

So, a devise to A. and his heirs, and if he dies within age, to all his younger children; the younger children take only for life. *R. Ca. Parl. 210. Skin. 339. 563.*

Tho' the devise be of his share in the New River; for share imports his part only, not his estate or interest in it. *R. & aff. in Parl. Ca. Parl. 210. Skin. 339.*

So, if a devise be to A. in tail, and to B. and other children other lands in tail, and if any child dies within age and not married, his part shall go to the survivors; the survivors take such part only for life. *R. 2 Ver. 388. R. 2 Leo. 129. 193. 3 Leo. 180. Cro. El. 52.*

So, to A. for life only without impeachment of waste, and if he dies leaving issue, to such issue and his heirs, gives only an estate for life. *R. 2 Mod. Ca. 261. 383.*

Or, to A. and B. for life, &c. and if either leave issue, to such issue, their survivors or survivor, the mother's share, and their respective issues. *R. 2 Mod. Ca. 253. 256. 382.; but this was reversed by the Peers, nine J. acc. three cont. to the judgment. [Eq. Ca. Abr. 185. Str. Rep. 805.]*

So, a devise to A. for life without impeachment; and if he has issue male, to such issue male and his heirs; and if he shall not have issue male, part to B. and his heirs; and if A. dies without issue male, the other part to C. and his heirs; A. takes only for life; for the words, if A. dies without issue male, are to be taken with regard to the words before, viz. if he shall not have issue male; and by the first words the intent appears that A. shall take only for life. *R. 3 Lev. 434. 1 Sal. 224.*

Or, to A. for life, and if he has no issue living, at his death, to B. and his heirs; but if he has issue at his death, to the heirs of A. *R. Ray. 28. 1 Sid. 47.*

So, a devise to A. for life, remainder to his first son in tail, remainder to his second son in tail, and so to all and every the heirs male of the body of A. and their heirs male, gives to A. only for life. *R. 2 Lev. 224.*

So, a devise to A. for life, and afterwards at his disposal to any of his children then living; he has only an estate for life, with power to dispose in fee. *R. 1 Sal. 240.*

So, if a man devises to A. in perpetuum, habendum to him for life. *Latch, 44.*

Or, the fee of his estate to A. for life, or to A. generally, with remainder to another. *Latch, 44. Dy. 357. a. in marg.*

Or, the fee to A., and after his death to B. who was A.'s heir; A. takes for life, remainder to B. for life, remainder to A. in fee. *R. Dy. 357. Bend. pl. 293.*

Or, to A. in perpetuum, remainder to B. in fee; A. takes only for life. *Dy. 357. a. in marg.*

So, if he devises to A., paying out of the profits so much; it shall be only for life. *2 Ver. 106. Vide ante, (N 4.)*

Or, paying for it so much per ann. which is less than the yearly value. *R. Dy. 371. b. D. 6 Co. 16. a.*

So, a devise to A. upon condition, that if he sells but to M. only, who is a joint purchaser with me, M. may enter: A. has it only for life. *R. Jon. 212.*

So, a devise to his wife for life if she does not marry, gives an estate *durante viduitate*. *R. Ray. 428.*

A devise to A. during his exile from his own country, gives an estate for life if he does not return, tho' his stay here was voluntary. *R. 2 Jon. 74. 1 Vent. 325. 2 Lev. 191. 2 Mod. 223.*

But if a devise be to A. for payment of legacies and debts of the testator, and afterwards to B. for life, &c. A. has not a freehold, as he would have if it were by deed, but a chattel only; tho' the end of the term be uncertain. *Per two J. Cro. El. 315, 316. 8 Co. 96. a. Semb. Al. 45.*

Or, a devise to A. during his son's minority. *Cro. El. 316.*

Or, till B. attain his age of 21 years. *2 Mod. 289. R. Dy. 210. R. Cro. El. 252.*

So, a devise for payment of debts till B. attain the age of 21, shall be a devise of a term till that time, tho' B. dies before such age. *R. Ca. Ch. 114. R. 3 Co. 21.*

So, a devise to A. and the heirs males of his body, remainder to B., &c. and if A. has no issue male, but daughters, that such daughters shall take the profits till B. pay 400*l.* A. dies, having no son, but a daughter; the daughter shall have a term till B. pays 400*l.* *Dub. Al. 45.*

A devise to A. at his age of 18 years, and that his wife shall take the profits to her use till A. attains 18 years, gives a term for so many years to the wife, which her second husband shall have, and may assign. *R. Hutt. 36.*

[If A. devises lands to B. and C., &c. in trust, out of the profits to pay his grand-daughter D. 100*l.* maintenance, till she marry or die, the residue to pay debts, &c. then for D.; and at her marriage, under certain conditions, to convey to E. for life *sans waste*, remainder to her husband for life, remainder to the issue of her body, with remainders over; and on further trust, if she dies unmarried, to the use of B. for life, remainder to the son of his other grand-daughter E. in tail, remainder to C. for life, remainder to his first and other sons, remainder to testator's right heirs; and on further trust, if D. marries contrary to the directions in the will, then to convey to trustees as to one moiety for D. for life, remainder to preserve contingent remainders, remainder to her first and other son, with remainders over; as to the other moiety, to E.'s son in like manner. D. has but an estate for life *sans waste*, with remainders over in strict settlement, as being the intent of A. upon the will, and this only a trust-estate executory. Had it been an immediate devise, it would be an estate-tail. *Ld. Glenorchy v. Bosville, M. 7 G. 2. C. T. T. 3.*]

[If A. devises leasehold estates to trustees, in trust, to assign to his grand-daughter M. at 21 or marriage, if she marries with their consent; if she marries without, then to convey to trustees for the sole use of M. during life, and then for the use of her issue. M. marries without consent, trustees convey, husband dies without issue; M. has only a right for life, for the issue by any husband would take by purchase. *Champion v. Pickax, P. 1737, 1 Atkyns, 472.*]

[If a man devises his lands to A. for life, remainder to B. and C. and their heirs, to support contingent remainders during A.'s life, remainder to the heirs of the body of A.; A. takes an estate for life not merged by the devise to the heirs of his body, but by that devise an estate-tail in remainder vests in A. *Colson v. Colson, M. 1741, M. 1743, P. 1744, 2 Atkyns, 246, 247. 250.* [Tamen quare, for Lord

Lord *Hardwicke* was not satisfied with the opinion of the judges in this case. *Per Lord Mansfield*, 2 *Bur.* 109; *et vid.* the case of *Perrin v. Blake*, 1 *Bur.* 2579. which is similar to this, and which was reversed in the Exchequer-Chamber, by six judges and barons against two.]

[If a man devises his lands to trustees and their heirs, on trust, by rents, mortgage, or sale, to pay his debts, and then devise them to trustees for 500 years, to pay legacies and an annuity, and then to the former trustees and their heirs, in trust for his nephew *A.* for life, without waste, remainder to trustees to preserve contingent remainders, then to the use of the heirs of the body of *A.*, and for default to his nephew *B.* for life, without waste, remainder to trustees to preserve contingent remainders, then to the use of the heirs of the body of *B.*, with like remainders to other nephews, and *A.* dies without issue; this is not an use executed, but a mere trust in equity to *B.*, and the whole fee being devised to the trustee, no legal fee can be limited upon it, and *B.* can take no legal estate, and has not an estate-tail, but an equitable estate for life only. *Bagshaw v. Spencer*, *H.* 16 *G.* 2. *M.* 1748, 2 *Atkyns*, 570. 577.]

[If lands are settled to one for life, and after his death to the issue of his body, it is always an estate for life; if to him and the heirs of his body, always an estate tail. *Meure v. Meure*, *P.* 1737, 2 *Atkyns*, 265.]

[Where an estate was limited by will to *A.* for life, remainder to his first and other sons in tail-male, remainder "to the use of all and every the daughters, &c. as tenants in common, and in default of such issue, to the use of the right heirs of the devisor;" after the death of *A.* without any son, an only daughter took only an estate for life. *Hay v. Coventry*, *B. R. H.* 29 *Geo.* 3. 3 *T. R.* 83.]

(N 8.) What Words make an Estate Joint, or in Common.

If a man devises land to *A.* and *B.* and their heirs, they are joint-tenants by a will, as well as if it was by deed. *Bend. pl.* 145. *Vide Estates*, (K 1. &c.)

So, if he devises to his two daughters and their heirs, they are joint-tenants, and do not hold in parcenary. *Dy.* 350. *b.* *Cro. El.* 431.

If he devises to three, and that the survivors shall be heirs to the other, they are joint-tenants. *Cro. El.* 163. *Ow.* 25. *Vide* 3 *Leo.* 19.

If he devises to the next of his blood, all in the same degree in consanguinity take jointly. *Per two J.* 2 *Rol.* 256.

If he devises to his daughters *A.* and *B.* for life, equally to be divided, remainder to the heirs of *B.*, they are joint-tenants for life. *R.* 6 *An. Eq. Ca.* 158. (2d Part of 1 *Mod. Ca.*)

If he devises to two, equally to be divided, *habendum* to them and the survivor, they are joint-tenants. *Eq. Ca.* 158. [*Vide* 2 *Rol.* 90. l. 5.]

So, if a man devises land to *A.* in fee, and afterwards devises, by the same will, the same land to another in fee; they are joint-tenants. 3 *Leo.* 11. 2 *Cro.* 49. *R. Yel.* 210. *Cro. El.* 9. *Vide ante*, (F 2.)

So, if by the same will, he afterwards devises a third part of the same land to another in fee. 3 *Leo.* 11.

[If a man devises lands to his wife for life, then to his daughter *A.* and her children, on her body begotten or to be begotten by *B.* her

her husband, and their heirs for ever, and *A.* has a child at the time of making the will; she takes as joint-tenant. *Oates v. Jackson*, *M.* 16 *G.* 2. *Str.* 117.]

[If *A.* devises lands to trustees and their assigns, till *B.* and *C.* attain 21, to receive the rents and apply them to their maintenance, and then to *B.* and *C.* for their lives, without waste, and then to the use of the heirs of *B.* and *C.* as tenants in common, the trustees take only a chattel interest during the infancy, and *B.* and *C.* are joint-tenants for life. *Trodd v. Downes*, *P.* 1742, 2 *Atkyns*, 304.]

[If a man devises lands to trustees, their heirs and assigns, in trust, to permit his sisters, *A.*, *B.*, and *C.*, and their assigns, to enjoy the premises to their separate use notwithstanding their coverture; and as his said sisters shall severally die, gives the premises to their several heirs, with a proviso, that the trustees shall sell what is necessary to pay his debts and legacies; the sisters take as tenants in common. *Sheppard v. Gibbons*, *M.* 1742, 2 *Atkyns*, 441.]

But if a man devises lands to *A.* and *B.* and their heirs, equally to be divided, they are tenants in common. *Cont.* till division made. *Dy.* 25. *a.* in marg. *R.* 1 *Leo.* 258. *R.* *Mo.* 594. *R.* 3 *Co.* 39. *b.* *R.* *cont.* *Cro. El.* 330. *Acc.* 2 *Roll.* 89. *l.* 40. *Cowp.* 660. *Vide Chancery*, (3 *V* 4.)—*Estates*, (K 8.)

[If *A.* devises his lands to trustees, to sell and pay debts, the residue to go and be equally divided among his three younger children, and the survivor of them, and their heirs for ever, they take as tenants in common, "equally to be divided," now being allowed to make tenancy in common in wills, though not formerly, nor to this day in grants. *Stones v. Heartly*, *M.* 1748, 1 *Vesey*, 165.]

[The word "alike," is the same as the word "equally;" and makes a tenancy in common in a will. *Per* *Ld. Mansfield C. J.* *Loveacres v. Blight*, *B. R. M.* 16 *Geo.* 3. *Cowp.* 357.]

[If a man devises land to his wife for life, and after her death to *A.*, *B.*, *C.*, *D.*, and *E.*, his sons and daughters, and the survivors and survivor of them, and the executor of such survivor, share and share alike, as tenants in common, and not as joint-tenants; it is a tenancy in common in fee. *Rose v. Hill*, *P.* 6 *G.* 3. 3 *B. M.* 1881.]

[So, if a woman devises a house to her husband for life, to her brother for life, to the children of her cousins *A.* and *B.*, or such of them as shall be then living, share and share alike, and if the brother is not living at the husband's death, that then the house be divided amongst the children as aforesaid; it is a tenancy in common to the children, and not for life only. *Oates v. Brydon*, *P.* 6 *G.* 3. 3 *B. M.* 1895.]

Or, to *A.* and *B.* equally, without more. *Dub. Dy.* 25. *a.* *Semb. Dy.* 25. *a.* in marg. *Per Poph. cont. Cro. El.* 696. *R. cont.* 2 *And.* 17.

["Equally," as well as "equally to be divided," implies a division, and makes a tenancy in common. *Per Ld. Mansfield, Denn v. Gaskin*, *B. R. M.* 18 *Geo.* 3. *Cowp.* 660.]

So, if a devise be to *A.* and *B.* and the heirs of either of their bodies, they are tenants in common. *Semb. Dy.* 25. *a.* in marg.

Or, heirs of every of their bodies. *Dy.* 326. *a.*

Or, to *A.* and *B.*, and if either dies, his heir shall inherit. 1 *Leo.* 258.

Or, to three and their heirs respectively. 3 *Lev.* 373.

So, a devise to two equally, and the heirs of their bodies. *R. Cro. El.* 443. 696. Or,

Or, to two and their heirs equally. *Cro. El.* 444. 696.

So, to two equally and their heirs. *R. Cro. El.* 443. 695. *Mo.* 558.

2 *Rol.* 89. l. 37.

So, to two and their heirs, part and part like. *Cro. El.* 444. 696. *R. Cro. Car.* 75.

[So, on a devise of residue of personal estate to *J. W.* and his heirs male equally to be divided among them; *J. W.* takes the whole for life, and then his sons equally. *Ambler*, 562.]

So, to *A. and B.*, children of his deceased daughter, and his surviving daughter, by equal parts, viz. a moiety to the children, a moiety to the surviving daughter; *A. and B.* are tenants in common of their moiety. *R. 3 Mod.* 210.

So, to two and the heirs of their bodies, equally to be divided. *Per two J. Dal.* 77.

To his two sons, to be equally divided; they are tenants in common for life. *R. 1 Bul.* 113.

To his two daughters habendum to them in common. *Dal.* 77.

To three daughters in tail, and that every of them be the other's heir in equal portions. *R. 1 And.* 194. *1 Bul.* 113.

[A man devises his lands to trustees and their heirs, in trust that the profits should be equally divided between his wife and daughter during the life of the wife, and after her decease, to the use of his daughter and the heirs of her body with remainders over; the wife and the daughter are tenants in common during the life of the wife, and the estate of the daughter dying before the wife is an estate *pur autre vie*, and during the wife's life shall go to the administrator of the daughter, by the statute of frauds, which takes away occupancy. *1 P. W.* 34.]

To two and the survivor and his heirs, equally to be divided; they are joint-tenants for life, the inheritance in common. *R. Eq. Ca.* 160. (2d Part of 2 *Mod. Ca.*)

To three sons and their heirs, and that the lands be equally to my said three sons; they are tenants in common. *R. 2 Rol.* 89. l. 50.

Yet, if a man devises to *A. and B.*, equally to be divided, and to the survivor; they are joint-tenants, and not in common; for the intent is express, that the survivor shall have it. *R. 1 Vent.* 227. 2 *Rol.* 90. l. 10.

But, to *A. and B. and their heirs, and to the survivor of them to be equally divided*, makes an estate in common. *R. per three J. Powell cont.* 3 *Lew.* 373. *1 Sal.* 226, 7.

Yet, to *A. and B. equally to be divided, and to the survivor and the heirs of the body of the survivor*, makes a joint estate. *R. Sti.* 214.

[A devise of the residue of a personal estate to three is a joint devise, and shall survive. 2 *P. W.* 347. *Vide etiam* 2 *P. W.* 529. 3 *P. W.* 115.]

(N 9.) What Words make a Condition in a Will.

Many words make a condition in a will, which will not make a condition in a deed. *Co. L.* 236. b. *Dougl.* 75. *Vide Condition*, (A 4.)

And, if the remedy would be otherwise defeated, it shall be taken for a condition; as, if a man having two daughters, and no son, de-
vise

wifes to one, *paying so much to her sister*; it will be a condition, and the other daughter shall enter for the condition broken: for otherwise she will be without remedy. *R. 1 Rol. 410. l. 50. R. 1 Leo. 174.*

So, in all cases where there are words of condition, it shall be construed as a condition, if the remedy is not thereby defeated: as, a devise to the second son, *upon condition that he pays so much to the daughters.* *R. 2 Cro. 56. R. Cart. 225.*

So, if a devise be to *A.* for life, remainder to *B.*, a condition may be annexed to the estate for life, and shall not be defeated by the remainder over. *R. Dy. 127. a.*

And, if the heir enters for the condition broken, the remainder is not thereby destroyed. *Dy. 127. b.*

So, if a devise be *upon condition to pay 5l. per ann. to B., and if he does not pay, B. may restrain*; it shall be a condition, tho' a distress is added. *Bend. pl. 281. Dy. 348. Vide post. (N 10.)*

(N 10.) What not.

But, where the intent does not appear to be to make a condition; words, which otherwise make a condition, shall not be construed as a condition: as, if a man devises land to *B.*, *paying a rent of 6l. per ann. to A., and if it be in arrear, that A. shall distrain*; the clause of distress shews that the word, *paying*, was not intended for a condition. *Dub. 8 Jac. 1 Rol. 411. l. 5. Lane, 56. Vide ante, (N 9.)*

If he devises rent out of land to his younger son, *for his education in literature*; it does not make a condition, but he shall have the rent though he be not educated in literature. *2 Leo. 154.*

If he devises land to the lessee of the same land, for a longer term, *under the covenants of the former lease*; those words do not make a condition, tho' the covenants of the former lease determine with the lease. *R. 2 Leo. 33. 1 And. 179. Poph. 8. Cro. El. 288.*

So, if he devises land to others, *upon trust, &c.* it shall not be a condition, when he reposes a trust in the devisee. *R. Cro. El. 288. Mo. 594. Poph. 8. Bend. pl. 287.*

So, if he devises to his wife, *paying 30l. to A., and that she shall give bond for payment*; for the bond was not necessary, if this was intended as a condition. *R. 1 And. 50.*

So, if he devises to *A.*, and gives legacies to be paid out of it; it is only a trust. *R. 2 Lev. 249.*

So, if by construing the words as a condition the remedy will be defeated, they shall not be taken as a condition, but as a limitation; as, if land of the nature of *borough English* be devised to the eldest son, *paying 40s. to his other children*; it shall be taken as a limitation, and the other children may enter for non-payment: whereas, if it should be a condition, the eldest son himself, who was heir, would take advantage of it. *R. Cro. El. 205. 3 Co. 21. a. 10 Co. 41. a. R. 2 Cro. 591.*

So, if a man devises land to an elder son, *upon condition that he pay to two younger sons, &c. and that they for non-payment shall enter.* *R. 1 Rol. 411. l. 28. Cro. El. 833. 920. Mo. 644. Noy, 51.*

So, if he devises to a younger son, *paying so much to his daughters, and if the younger son dies before full age, to the eldest son, paying, &c. and if he dies not pay, to the daughters*; this shall be a limitation. *R. 1 Rol. 411. l. 50. Cro. El. 376. Ow. 112. Gouldsb. 154.* So,

So, if a devise be to *A.* and *B.* and their heirs, *provided that if either of them dies, the survivor shall sell for payment of legacies*; it shall be a direction, &c. and not a condition, for then the whole would be defeated. *R. Cart. 3.*

So, if a devise be to *A.* for life, or in tail, *provided that if A. marries without consent, &c. it shall remain to B.*, it shall not be a condition, but a conditional limitation, upon which *B.* may enter if *A.* marries, &c. *R. 2 Lev. 21. Ray. 236. 1 Mod. 86. 1 Vent. 202, 203.*

So, in all cases where a remainder is limited to another upon a breach, or failure of a condition. *Per Periam, 1 Leo. 283. R. 2 Leo. 38. Ow. 8. 55. 1 Rol. 411. l. 30. 45.*

As, if a devise be to *A.* his heir, and other land to *B.*, and if *A.* molest *B.* the devise to him shall be void, and *B.* shall enter; it shall be a limitation, and not a condition. *R. 2 Mod. 7.*

So, if a devise be to a woman, *provided that she marries and has issue by one of the name of S.*, and for default, to *B.*, tho' the woman takes an estate-tail, it shall be conditional limitation to *B.* if the woman dies not having issue by *S.* *R. Sal. 570.*

But, a devise for life, or in tail, upon an express condition, remainder over to another, shall be taken as a condition, tho' by entry for the condition broken, the remainder will be destroyed: as, a devise to *A.* in tail, upon condition that he do not alien, and for default of issue, remainder to *B.* in fee. *Per two J. 1 Rol. 412. l. 7.*

If a devise be to a woman of a rent-charge for life, and if she marries, that his executor pay her 100*l.* and the rent shall cease, and return to the executor; it shall not cease till the 100*l.* be paid. *Per two J. 1 Mod. 273.*

[If a man possessed of leasehold devises to his wife for life, then to such child as she is *ensient* with, and its heirs for ever, if it dies before 21 without issue, the reversion one-third to wife and her heirs, and one-third to sister *E.* and her heirs, and one-third to sister *A.* and her heirs, and makes wife executrix, and dies, wife not being *ensient*; the devise over in thirds is good. *Andrews v. Fulham, T. 11 G. 2. Str. 1092. Andr. 263.*]

[So, with regard to fee-simple lands. *Guliver v. Wicket, M. 19 G. 2. in B. R. Sed contra in C. B. per Willes C. J. and Parker J. Str. 1093.*]

[So, if a man devise to his son of whom he supposed his wife to be *ensient* at the time of making his will, when he should attain his age of 21 years; but if it should happen to be a daughter, then one moiety to his wife, and the other to his two daughters (there being one daughter alive at that time) when they should attain their ages of 21; if either of the daughters should die before that time, her share to the survivor, if both should die before that time, their moiety to the wife in fee; if she should die, her share to the daughters; this is a limitation of the estate, not a condition; and, if the testator die, his wife not being *ensient* at the time of the will, or at his death, and the daughter die under age and without issue, the wife shall take the whole estate. *Cowp. 40.*]

[Under a devise to the testator's son for life, remainders in tail to his first and other sons, &c. by any future wife, but if he married any person related to his present wife, in such case to go over to the children of the testator's brother; the event of the son's marrying a
second

second wife related to his first is not a condition precedent; and on his death without marrying again, the estate rests in the children of the testator's brother, and does not descend to the testator's heir at law. *Bradford v. Foley*, B. R. H. 19 Geo. 3. *Dougl.* 63]

As to a devise for payment of debts, and legacies, *vide Chancery*, (3 A 3, &c.)

As to a devise of lands to be sold, *vide Chancery*, (3 A 6, 7.)

(N 11.) Condition, how expounded.

The words of a condition shall be expounded strictly: as, if a devise be to A., B., and other children severally in tail, *provided that if any child dies within age and before marriage, his part shall go to the survivors*; if A. dies before marriage, and afterwards B. dies before marriage, tho' his part which accrued by the will survives, yet that part which he had by the death of A. does not go to the surviving children. R. 2 Ver. 388.

[“ I give to my grandson, his heirs and assigns, but in case he dies “ before 21, or marriage, and without issue, then to B.,” shall be expounded, “ in case he dies before 21 unmarried, and without issue;” and attaining 21 is a performance of the condition, especially as it is not a condition precedent. *Barker v. Suretees*, M. 16 G. 2. Str. 1175. *Vide* 1 Term Rep. 346. 3 T. R. 470. 4 T. R. 706. 709. *Dougl.* 74. *Moor*, 422. 1 Leon. 74. 3 Atk. 390. 1 Wils. 140.]

[If one devise lands to his wife for life, and after her death to his son in fee, on condition to pay his daughter 1000*l.* within a year after the death of J. S., with a proviso that, if the money be not paid, the daughter may enter and receive the profits till payment; J. S. dies, living the wife; the daughter shall have the 1000*l.* during the life of the mother, and in default of payment, equity will decree a sale of the reversion. 1 P. W. 478.]

[Under a devise to a wife for life, *provided she remain a widow*; but in case she marry a second husband, then to J. S. *when he shall attain his age of 23 years*; the wife has an absolute estate till J. S. be 23, tho' she marry before. 1 Term Rep. 389.

(N 12.) What Words make an Estate by Implication.

So, by a will a man may have an estate by implication, where such implication is necessary: as, if a man devises a house to his son and heir *after the death of his wife*; the wife, by implication, shall have it for her life: for his heir cannot take till her death. *Vau.* 262, 3. R. *per all the J.* 15 H. 7. 17. b. R. Mo. 852, 3.

So, if he devises to A. his son for life, *and after the death of A. and his wife*, to the next heir of A., the wife of A. takes for life. R. 1 Lec. 257.

So, if he devises to all his sons except A., *and if all his sons die without issue*, to B., without saying, *except A. shall take in tail before B. shall have it in remainder.* Dal. 4.

If a devise be to A. till his daughter and heir attains 16, *and if the daughter dies*, B. shall have it; the daughter takes by implication for life. 3 Leo. 55.

So, if he has two daughters his co-heirs, and devises to one *after the death*

death of his wife; the wife takes by implication for life. *R. 2 Ver.* 723.

So, where the implication is necessary, the devisee may take, tho' he takes another thing or land by express words in the same will: as, if a man devises goods to his wife, and after the death of his wife devises his house to his heir. *Vau.* 263.

[So, if a man devise lands, "which he has before given to A.," over to B. on a certain event happening, tho' in fact he had not before given these lands to A., this is a devise to A. by implication. *Ambler*, 661.]

[So, if a man possessed of a leasehold estate for lives, devise it to his daughter Mary, after the death of his daughter Betty, the next cestuy que vie, this is a devise to Betty by implication. *2 Bl. Rep.* 692.]

So, if a devise be to receive rents and profits during the lives of the testator's four daughters and the survivor, and to pay the same to such survivor, and the children of such as die; remainder to the children (after sale) in equal portions; the four daughters, during their lives, are entitled to the annual rents and profits. *2 Bl. Rep.* 1014.]

[If a man devises to trustees, to convey to his son A. at 23 for life, with power to trustees to settle a jointure, and in strict settlement on the issue of the marriage; but if A. dies without issue of his body, then to B., the latter words give A. an estate-tail by implication. *Allanson v. Clitheroe*, *T.* 1747, *1 Vesey*, 24.]

[If A. devises to B. for life, and no longer; he taking the name of A. and living at his house, and after his death to such son as he shall have taking the name of A., and for default of such issue to C. his heir at law; and after disposing of the next turn of some presentations, gives the PERPETUITY of them to B., in the same manner as his estate; B. must by necessary implication, to effectuate the manifest general intent of A., be construed to take an estate in tail male, he and the heirs of his body taking the name of A., notwithstanding the express estate devised to B. for his life, and no longer. *Robinson v. Robinson*. *Per B. R.* unanimously, *M.* 30 G. 2. confirmed in Chancery by lords commissioners, *H.* 1757; and affirmed by the lords, on the unanimous opinion of all the judges, *H.* 1758, *2 Vesey*, 225. *1 B. M.* 38.]

[Under a devise to A. for life, and after his decease to and amongst his issue, and in default of issue then over, A. takes an estate-tail in order to give effect to the devisor's general intent. *Doe v. Applin*, *B. R. M.* 31 Geo. 3. 4 *T. R.* 82.]

[Under a devise to A. and the heirs of her body for ever as tenants in common, and not as joint-tenants, and in case A. die before 21, or without leaving issue of her body, then to B., it was holden that A. took an estate-tail. *Candler v. Smith*, *B. R. E.* 38 Geo. 3. 7 *T. R.* 531.]

[Under a devise to A. for life, without impeachment of waste, remainder to his eldest son, and the heirs of such eldest son, and in default of issue male of A., then to B., &c. A. takes an estate for life, remainder to his eldest son in tail, remainder to himself in tail. *Bean v. Halley*, *B. R. M.* 39 Geo. 3. 8 *T. R.* 5.]

[If A. by voluntary deed vests a term in trustees, to pay the profits to B. his daughter for life, and immediately after her death to the heirs of her body, and for default of such issue to C., her executors,
 &c.]

Ec.; *B.* dies, having had a child which died in her lifetime, the whole vested in *B.*; did it not, it vests in her child, and does not go over to *C.* by the last limitation. *Theobridge v. Kilburne*, *H.* 1750, 2 *Vesey*, 233.]

[If a man seised in fee leaves legacies for life, and in fee, directing them to be paid yearly and every year, by his trustee and executor; leaves a sum for repairs of the farm, a sum to build a tomb, and he and his heirs always to see it kept in order; and directs a bed to be left in a closet, that his trustee may come over and lodge there when he pleased, without molestation, and appoints him sole executor and trustee, he paying all debts, &c.; he takes a fee by implication. *Oates v. Cooke*, *P.* 5 *G.* 3. 3 *B. M.* 1684. *Vide* a similar case, 2 *Bl. Rep.* 1041.]

[If a devise be to the heirs male of *J. S.* (who are only to enjoy it for their lives, of which none of them are to be tenants any longer, nor shall it be in any of their powers to sell or dispose of the same,) and afterwards in a schedule annexed this estate be recited to be given to *J. S.*, this shews the intent of the testator to give him an estate for life; which the law will unite to the estate given to his heirs male, and construe him to be tenant in tail. 2 *Bl. Rep.* 698. *Infra*, (N 24.)]

(N 13.) What not.

But lands do not pass in a will by a possible and constructive implication, for the heir shall not be disinherited, but by a necessary implication: as, if a man devises that *A.* shall have his lands after the death of his son and daughter without issue; the daughter does not take an estate by implication. *R. per three J. Vau.* 260, 261, 262, &c. *Vide post.* (N 22.)

So, a devise to his son *A.* of *Sofields*, and also *I will that my bargains from N. my son A. shall enjoy, and his heirs for ever, and for want of heirs of his body, to remain to my heir; A. shall not have an estate-tail in Sofields* by implication. *Vau.* 262. *Cro. Car.* 268.

If *A.* leases part of his land to a stranger, and devises to his wife his land in the occupation of the lessee, and after the decease of his wife, wills that it, with all the rest of his lands, shall remain to his younger son; the wife does not take the land, not leased, for life. *Vau.* 266. *Mo.* 123.

Or, devises one acre to his wife for life, and the other acre, after the death of his wife, to a stranger. *R.* 2 *Leo.* 226.

If *A.* has 100 acres named *Jacks*, and let a house and 40 acres to *B.*, and afterwards devises the house and all the lands called *Jacks* in the tenure of *B.* to his wife, and all his house and all other lands named *Jacks* to *B.*, after the death of his wife; she shall not have the residue of *Jacks* for her life. *R.* 2 *Leo.* 226. *Vide ante*, (N 3.)

If a man devises to *A.* for life, and afterwards that the land shall return, after the death of him and his wife, to *B.* and the heirs of his body, who was not heir to the devisor: the wife takes nothing, but his heir shall have it during the life of the wife. *R.* 2 *Jon.* 98. 2 *Lev.* 207.

So, if a term be devised to his son after the death of his wife; it shall not be a devise to the wife, but goes to the executors in the mean time. *Per three J.* 2 *Cro.* 75.

So, if devised to his executor after the death of his wife; for the executor shall have it in the mean time as executor, tho' not as legatory. *Per Popb. Yel. cont. 2 Cro. 75.*

If he devises underwood, as a provision for younger children, for 23 years after the death of his wife; the heir shall have it during the life of the wife. *R. 1 Ver. 22.*

If a man, having no son but two daughters, devises part of his lands to his wife for life; and by another part of his will, devises all his lands, after the death of his wife, to one daughter and the heirs of her body; the wife does not take an estate by implication in the lands not limited to her for life: for the words, after the death of the wife, are satisfied by the limitation of the jointure lands after the death of the wife. *R. Eq. 115. Pr. Ch. 439. 452.*

So, if A. has two daughters by different venters, and devises a moiety of land to his wife for seven years, and that the eldest daughter shall enter into the other moiety at her marriage, and if his wife be enseint with a son, that the son shall have the land, if enseint with a daughter, that she shall have her share with his two daughters; the wife is not enseint; she enters into a moiety, and within the seven years the eldest daughter marries and enters into the other moiety, and within the seven years the youngest daughter dies without issue; the eldest daughter shall have only a moiety and not three parts, for the heir of the whole blood shall have the other moiety. *1 And. 47. Dy. 342. a. Vide post. (N 22.)*

So, an estate does not pass in a will by implication, when by such construction his estate expressly given would be destroyed. *1 Sal. 226. Vide ante, (N 6.)*

So, no one shall be tenant in tail by implication, when a devise is made to him expressly only for life. *2 Ver. 451. Eq. Ca. 128. [Vide cont. (N 12.)]*

[If A. seized of the reversion in fee of lands settled on his son B.'s marriage, devises them, on failure of issue of B. and for want of heirs male of his own body, to his daughter F. and the heirs of her body; it does not give an estate-tail by implication to B. *Lady Laneborough v. Fox. Per the Judges in parliament, P. 6 Geo. 2. C. T. T. 262.*]

[If a man gives lands to his daughter for life, and says, if she departs this life without issue of her body living at her death, then to trustees till A. attains 21, then to A. after he shall attain 21, with limitations over; the daughter surviving and having issue, has not an estate-tail by implication. *Lethieullier v. Tracy, P. 1754, 3 Atkyns, 784. 793.*]

[If A. devises the residue of real and personal to B. for life, if she leaves children at her death, all to them, if she dies without issue, to a charity; B. does not take an estate-tail by implication, but on her death without issue living, the real goes to the heir at law, and the personal to the charity. *Vaughan v. Farrer, H. 1750, 2 Vesey, 182.*]

[If a man gives the use and occupation of a house and fields, with the furniture, to his daughter for life, makes the furniture heir-looms, then gives the house to her generally for life, without impeachment, &c. and after her death, the premises with all other real estate to A.; the two first clauses are co-extensive, and she has only the use and occupation, but has no estate by implication in the house, &c. nor in the rest of the real estate. *Boon v. Cornforth, P. 1751, 2 Vesey, 277.*]

[If *A.* devises lands to *B.* in tail-male, then to *C.* in tail-male, &c. "on condition that whenever the land shall come to any of the persons, the persons to whom the same from time to time shall come shall then change their surnames and take upon them and their heirs the surname of *A.* only, and not otherwise." (But no devise over, tho' in another proviso there is.) This is not a limitation by implication, nor a condition precedent, but subsequent, and is barred by recovery. *Gulliver v. Ashby*, 7 G. 3. 4 B. M. 1929.]

(N 14.) What Words make Cross-Remainders.

[Where cross-remainders are to be raised by implication between two and no more, the presumption is in favour of cross-remainders. Where they are to be raised between more than two, there the presumption is against cross-remainders. But that presumption may be answered by circumstances of plain and manifest intention, either way, apparent on the face of the will. *Per* *Ld. Mansfield C. J. Pery v. White*, B. R. E. 18 Geo. 3. *Cowp.* 780. *Phipard v. Mansfield*, B. R. E. 18 Geo. 3. *Cowp.* 800.]

If a man devises lands to *divers persons and the heirs of their bodies, and if they all die without issue of them, or any of them*, remainder to *A.*; they all have cross-remainders in the part of each, so that *A.* shall take nothing in remainder till each is dead without issue. *R. Dy.* 303. *b. Adm. Hob.* 33.

So, if he devises *Blackacre* to *B.* and his heirs, and *Whiteacre* to *A.* and his heirs, and that the survivor shall be heir to the other, if either of them dies without issue; *B.* and *A.* have cross-remainders upon the death of the one or the other without issue. *R. 2 Cro.* 695.

So, if a devise be to *A.*, *B.*, and *C.*, and if any of them dies before the others, the others shall be heirs to him, equally to be divided, and if all die without issue, to *D.*, &c. each has an estate-tail. *R. 2 Cro.* 448. 3 *Leo.* 19.

So, if devise be to his two daughters and their heirs, and if they die without issue, all the same lands to *B.*; they are cross-remainders to the daughters; for the intent appears, that *B.* shall not take till both die without issue, and then the whole land. *R. Ray.* 453. 2 *Jon.* 172. *Pot.* 425. 434. *Skin.* 18. [*Cowp.* 31.]

[So, if a man devise to his two brothers and his sister, and the heirs of their bodies, and for want of such issue, to his own right heirs; "for want of such issue," shall be construed for want of issue of all of them, and they shall take cross remainders. *Cowp.* 797.]

[If a man devises to trustees, as soon as his three daughters attain their respective ages of 21, to convey to them and the heirs of their bodies, and their heirs, as joint-tenants; the estate shall be conveyed to each at 21 respectively, with cross-remainders to the three daughters. *Marriat v. Townly*, T. 1748, 1 *Vesey*, 102.]

[The limitations in a deed were to trustees to the use of *A.* and *B.* for their lives, remainder to the use of the child or children of *B.* in tail, as tenants in common, "and in case any such child or children should die without issue of his, her, or their bodies, then the part of such child should be and remain to the use of the surviving child or children of *B.*, and the heirs of his or their bodies issuing; and in case all the said children should die without issue," &c. then to *A.* in

A. in fee; held that the deed raised cross-remainders between the children of *B.*; and that on the death of one without issue, his share vested in a surviving child and the heir of one deceased, as tenants in common. *Watts v. Wainwright*, *B. R. M.* 34 *Geo.* 3. 5 *T. R.* 427.]

[*A.* devised to all and every the daughter and daughters of the body of *B.*, and the heirs male of the body of such daughter or daughters equally between them, if more than one, as tenants in common, and for default of such issue, he devised all his said lands to *C.*; it was holden that the daughters of *B.* took cross-remainders. *Atherton v. Pye*, *B. R. T.* 32 *Geo.* 3. 4 *T. R.* 710.]

(N 15.) What not.

But where each takes an express and several estate by the devise, there shall not be cross-remainders by implication: as, if a devise be of a house to *A.* and his heirs, another to *B.* and his heirs, another to *C.* and his heirs, and if they all die without issue, the houses shall remain to *D.* If *A.* dies without issue, his house shall go immediately to *D.*, and there shall be no cross-remainder to the survivors. *R. per three J.* *Lee dub.* 2 *Cro.* 656.

[If *A.* devises lands to his wife for life, then to his son and daughter *J.* and *M.*, to be equally divided between them, and the several and respective issues of their bodies, and for want of such issue, to his wife in fee; this does not create a cross-remainder which is never favoured, and can only be raised by an implication absolutely necessary, which is not here, the words *several* and *respective* effectually disjoining the title. *Davenport v. Oldis*, *T.* 1738, 1 *Atkyns*, 579. *Vide Corp.* 780. 800.]

[Cross-remainders have never been adjudged to arise merely upon these words, *in default of such issue* *Ibid.*]

So, if a man devises to *A.* and *B.* for their lives, remainder to their two sons and their heirs equally, and each to be heir to the other; and if both die without issue, remainder to *D.* If either dies without issue, his part shall go to *D.* *R. cont.* 4 *Leo.* 14. *R. acc.* 2 *Rel.* 416. l. 25. But it was denied, *Ray.* 455. & *Pol.* 434.

[If a man devises to his grandson *A.*, and his grand-daughter *B.*, equally to be divided, and to the heirs of their respective bodies, and for default of such issue to his grand-daughter *C.* in fee; there are no cross-remainders, but *C.* shall take on the death of either. *Comber v. Hill*, *P.* 7 *G.* 2. *Str.* 969. *Williams v. Browne*, *M.* 8 *G.* 2. *Str.* 996.

If he devises to *A.* his eldest daughter and her heirs a house, another to *B.* his youngest daughter and her heirs, and if she dies before sixteen, living *A.*, her house shall be to *A.*, and if *A.* dies without issue, living *B.*, her house shall be to *B.*, and if both die, having no issue, all the houses shall be to others; if *B.* dies after 16 without issue, *A.* shall not have it, for they are not cross-remainders. *R. per three J.* *Dy.* 330. b. (*Vide* 2 *Jon.* 173.)

[If a devise be to his two daughters and their issue, and for default of such issue to *B.*; they are not cross-remainders to the issues; for they have a joint-estate for life, with several inheritances; and upon death, tho' the one has issue, the part of the other shall go to *B.* *R.* 2 *Ver.* 545, 6.

So, where devises are made to three or more, there never shall be

cross-remainders to the survivors, without express words for the confusion and uncertainty. *Per Dod. 2 Cro. 656. Adm. Pol. 434. Skin. 20. [Coup. 800.]*

As, if a devise be to three sons severally in tail, and if any one dies without issue, the survivors shall be each other's heir. *Dub. Sav. 92.*

[If a man devises lands to his grand-daughters Catherine and Elizabeth, to be equally divided between them, and the heirs of their bodies respectively, and for default of such issue to his grand-daughter Ann; and Elizabeth dies without issue, her moiety goes to Ann. *Comber v. Hill, P. 7 G. 2 B. R. H. 22. 2 Str. 969. S. C.*]

[Where a man after several devises, gives the remainder to his four sisters, and a niece for their lives, share and share alike, as tenants in common, remainder to their sons successively in tail, remainder to their daughters in tail, reversion to his own right heirs; the four sisters and the niece take several estates for life, with several remainders to their sons and daughters: there are no cross-remainders. *Coup. 777.*]

(N 16.) What Words make an Executory Devise.

If a devise be to A. upon a contingency or condition precedent, A. takes nothing, but by way of executory devise when the contingency, &c. happens; for in the mean time he has only a possibility: as, if a man devises to his son in fee, and if he dies in the life of A., then to A., A. shall take when the son dies, (if it be in his lifetime,) by executory devise. *R. 2 Cro. 590. Vide Springing Use, in Uses, (K 7.)*

[If lands be devised to A., his heirs and assigns for ever, and if he die leaving no issue behind him, then over; the limitation over is good by way of executory devise. *Porter v. Bradley, B. R. E. 29 Geo. 3. 3 T. R. 143.*]

[So, if a devise be to A. for ever, that is, if he shall have a son or sons who shall attain 21, but if A. shall die, without son or sons to inherit, that the son of B. shall inherit; this is a fee in A., with an executory devise to the son of B., who shall take if A. die without issue, or if the issue die before 21. *1 Brown's Ch. Rep. 147.*]

[So, if a devise be to the second son (then unborn) of A. B., and after his decease, or accession to his paternal estate, then to his second son, and his heirs male, with remainders over; such second son of A. B. when born, will take an estate in tail-male by way of executory devise, determinable on the accession of the family estate, and in the mean time the lands descend to the heir of the testator. *2 Bl. Rep. 1159.*]

[If a man devises to trustees and their heirs, to the use of trustees for 500 years, to raise fortunes and pay debts, and after determination of that estate to the first and other sons of A. his eldest son in tail-male, remainder to B., his second son (in being) in tail-male, and remainders over; and at devisor's death A. has no son, but has one afterwards, such son shall take by way of executory devise. *Gore v. Gore, M. 7 G. 2. B. R. On a case from Chancery; and decree in consequence, per Talbot C. Str. 958.*]

[If a man devises to trustees and their heirs, to the use of them and their heirs, in trust for A. (the eldest son of B., testator's heir at law) for life, remainder to his first and other sons in tail-male, and for want of such issue, if B. has any other sons, to them, in like manner, and for want of such issue to the daughters of B., in like manner, and for

for want of such issue to the first and other sons of C., in like manner, and then to testator's right heirs; A. dies in testator's life, testator dies, B. has no other son, nor is any remainder-man *in esse* except a son of C.; this shall enure as an executory devise to any son B. may hereafter have. *Hopkins v. Hopkins*, M. 8 G. 2. C. T. T. 44. 1 *Ves.* 268. 1 *Atk.* 581.]

A devise to the eldest son and his heirs, and if he does not pay such and such legacies, to the legatees and their heirs; it takes effect as to them as an executory devise, for his heir does not take by the devise. *R. Cro. El.* 920. *Vau.* 271.

So, if a devise be to A., to commence at a time after the testator's death, and there is no devise to any one, so that it descends to the heir in the mean time; this takes effect as an executory devise; for it cannot be a remainder, there being no particular estate on which it depends. *Vau.* 269.

As, if a devise be to an infant *in ventre sa mere*: for till the birth the devise does not take effect. 2 *Mod.* 9. 1 *Sal.* 229. [*Acc. per Talbot C.* in conformity to the opinion of all the judges of *B. R.* *Stephens v. Stephens*, M. 10 G. 2. C. T. T. 228.] *Vide ante* (1).

[If A. devises to his wife for life, then to the child she is *ensient* with, and its heirs, provided if it die before 21 without issue, then to A., B., and C.; and the wife is not with child; it is an executory devise, and A., B., and C. take on the death of the wife. *Gulliver v. Wicket*, M. 19 G. 2. 1 *Wils.* 105.]

So, a devise to the daughter of B., who shall marry a Norton within 15 years, is good, by way of executory devise. *R. Ray.* 83.

So, a devise from *Michaelmas* for 15 years, remainder to A. and his heirs; if the devisor dies before *Michaelmas*, the remainder will be good, for it descends to the heir in the mean time. *R. Cro. El.* 878. *Noy*, 43.

[A. devises land to B. for 90 years if he so long live, then to the heirs of the body of B. in default, to C. for 90 years, if he so long live, to commence from the death of B. without issue, then to D. for life, and then to his first and other sons. Testator's intent is to give an estate-tail to such person as shall be heir of the body of B., to him and the heirs of the body of B., which may take effect as an executory devise. And the freehold descends (in the mean time) to the testator's heir-at-law. *Harris v. Barnes*, H. 8 G. 3. 4 *B. M.* 2157.]

[If A. devises land to his wife for three years, to his son for 99 years if he so long live, to him for other 99 years if his wife so long live, to the heirs of his son's body, and the heirs of their bodies, remainder over in fee; it is a good executory devise to the heirs of the son's body. *Doe v. Carleton*, T. 21 & 22 G. 2. 1 *Wils.* 225.]

[If A. gives 550*l.* to his daughters, and then devises his lands to trustees for 99 years, with power to raise a lesser term on trust if his wife shall in four years pay the 550*l.* to the trustees for his daughter's benefit; then he gives his lands to his wife for life, then to his son and his heirs male and female, and for want of such issue, to him and his heirs for ever; this is a conditional limitation in the wife, taking place as an executory devise; the freehold descends to the son, till the four years elapse, or the wife perform the condition, as part of the inheritance undisposed of; and by the devise he has an estate-tail

in the inheritance, expectant on the determination of the 99 years term. *Hayward v. Stillingfleet*, M. 1737, 1 Atkyns, 422.]

So, a devise till A. attains the age of 21 years, and then to A. and his heirs, and if A. dies before, to the heirs of the body of B. as they shall attain their respective ages of 21 years; if A. dies in the life of B., yet the heir of B., if he be of full age, shall take at the death of B. by executory devise. *Semb. 2 Mod. 291.*

So, if a devise be to commence within the compass of a life, it will be good: as, if husband and wife seised of a copyhold and to the heirs of the husband; he surrenders to the use of his will, and devises to the heirs of the body of his wife, if they attain the age of 14 years, remainder to A., and the wife has issue by a second husband which attains the age of 14; the devise to him shall be good by way of executory devise. *Per Twissd. and Keeling, contra Morton and Wynd. Ray. 163. 1 Lev. 135.*

[If A. and B., each having lands, settle them before their intermarriage to A. for life, B. for life, to the children for such estates, &c. as B. shall appoint; for want of appointment, to children equally; for want of such issue, to such persons and uses as B. shall appoint; for want of such appointment, A.'s lands to his heirs, and B.'s lands to her heirs; A. dies leaving one son, B. by will appoints the whole to him, but if he dies without issue, and under 21, then to others, and he dies so under age and unmarried, this is a good executory devise. *Throustout v. Denny*, P. 23 G. 2. 1 Willf. 270.]

[A devise of a real estate to B. after a good executory devise thereof to the heirs male of the body of A., from and after the decease of A., and limited on default of such issue, is a good executory devise, vesting, either in possession, on the death of A. without leaving issue male, or as a remainder after an estate-tail, on his death leaving issue male. *Doe v. Fonnereau*, B. R. M. 21 Geo. 3. Dougl. 486.]

A devise of such land to A. the eldest son, such to B., and such to C., and if any of them die, his estate shall remain to the others, shall be a good executory devise; and the part of the eldest is not merged by descent of the reversion. *R. 2 Lev. 202.*

So, if a devise be to commence within the compass of a life or lives. *1 Sal. 229.*

Or, within 20, or 30 years. *1 Sal. 229.*

As, a devise to A. for 15 years, and afterwards to the first son of B. *Ray. 83.*

If the testator shews, that he intends it *in futuro*, and not *in presenti*. *1 Sal. 229.*

[An executory devise is too remote, if it exceeds a life or lives in being, and 21 years after. *Goodman v. Goodright*, M. 33 G. 2. 2 B. M. 873. 3 T. R. 146.]

[If it is too remote in its creation, the event cannot vary the construction. *2 Burr. 873.*]

[After a devise to an infant *in ventre sa mere* for life, in case it should be a son, remainder to such issue male or the descendants of such issue male of such child, as at the time of his death should be his heir at law, and in case at the time of the death of such child there should be no such issue male nor any descendants of such issue male then living, or in case such child should not be a son, then over; the limitation

limitation over is not too remote to take effect. *Long v. Blackall*, B. R. H. 7 T. R. 100.]

[An executory devise is good if it must necessarily happen within a life or lives in being, and 21 years, and the fraction of another year, allowing for the time of gestation. *Per Lord Kenyon. Ibid.*]

[Under a bequest of a term of years "to A. and the heirs of his body, and their heirs and assigns for ever, but in default of such issue, then, after his decease, to B. and his heirs;" the limitation over to B. is good by way of executory devise. *Wilkinson v. South*, B. R. E. 38 Geo. 3. 7 T. R. 555.]

[Under a devise to T. F. and his heirs for ever, and in case he should depart this life, and leave no issue, then to E., M., and S., or the survivors or survivor of them, share and share alike; the devise to E., M., and S. is a good executory devise. *Sheers v. Jeffery*, B. R. E. 38 Geo. 3. 7 T. R. 589.]

[An executory devise in fee is like a contingent remainder, (tho' it is not a contingent remainder,) and is transferable to the heir of the executory devisee, who dies before the contingency happens. *Goodright v. Searle*, P. 29 G. 2. 2 Wilf. 29.]

[A devise to A. and his heirs, but if he die before 21, then to B. and his heirs, is a good executory devise to B., and if B. survive the devisor, it will descend to B.'s heir, though he die before the contingency happens, namely, the death of A. before 21. *Gurnall v. Wood*, C. P. T. 13 & 14 Geo. 3. *Willes*, 211. 7 Mod. 8vo. edit. 302. S. C.]

(N 17.) What not.

But a devise does not operate as an executory devise but for necessity: and therefore, where a man devises to A. for life, and if he dies without issue living at his death, to B., it shall be a contingent remainder to B., and not an executory devise. *R. Ray*. 29. 1 Sid. 47. 1 Lev. 11. [*Dougl.* 758.]

[And the reason is, because an executory devise puts the inheritance in abeyance. *Ives v. Legge*, B. R. 3 T. R. 488. *in not.*]

[So, if A. having a son and two daughters devises, if his son dies without issue, his lands to descend to his daughters and their heirs, and if they die without issue, then to his nephew; and after other clauses gives all his estate undisposed of to his son; this is not an executory devise to the nephew but a contingent remainder. *Wealthy v. Byville*, P. 9 G. 2. B. R. H. 258.]

Or, devises to another upon a contingency, without any previous estate to him; if there be a precedent estate for life to another, which is sufficient to support the contingent remainder, it shall never be construed an executory devise, but a remainder. *Per Hale*, 2 Sand. 388.

So, it shall not be an executory devise, where there is an express devise of the same land precedent. *Per Wind. Ray*. 164. if there be a particular estate precedent. *D. 4 Mod.* 284. *Skin.* 431.

As, if a devise be to A. for life without impeachment, and if he has issue male, to such issue male and his heirs; if he has not, to B. and his heirs; here being a freehold, the devise to the issue male shall not be

executory, but a contingent remainder. *R. 1 Sal. 224. [1 Ld. Raym. 208.]*

So, a devise by words *de presenti* shall not be taken as an executory devise: as, *I give the inheritance to the heir of A.*, and *A.* is living at the death of the testator. *1 Sal. 226.*

So, if a man devises to *A.* for years, and afterwards gives the inheritance to the heirs male of *A.*; for it is a devise *per verba de presenti*, and limited as a remainder. *R. 1 Sal. 226.*

Or, to *A.* for 10 years, and then to the first son of *A.* and the heirs male of his body. *R. 1 Sal. 229.*

[*A.* devised to *B.* for life, remainder to *C.* for 99 years if he should so long live, remainder to the heirs of the body of *C.* The remainder to the heirs of the body of *C.* was held a contingent remainder and not an executory devise, and was defeated by *C.*'s surviving *B.*, there being no preceding estate of freehold to support it. *Mussell v. Morgan, B. R. T. 30 Geo. 3. 3 T. R. 763.*]

So, an executory devise, after the death of any one without issue, is void. *1 Lev. 136. Acc. 1 Sal. 229. Cont. per Vau. 270.*

As, if *A.* be tenant in tail, the reversion to *B.* in fee; a devise by *B.* to another when *A.* dies without issue, is void. *Semb. 1 Sal. 233.*

[*A.* devises an advowson to the first or other son of *B.* that should be bred a clergyman, and be in holy orders, in fee; but in case *B.* should have no such son, then to *C.* in fee. Both devises are void, as depending on too remote a contingency; therefore though *B.* dies without having had a son, the heir at law of the devisor, and not *C.*, is entitled. *Proctor v. Moore, C. P. M. 35 Geo. 3. 2 H. Bl. 358.*]

[If a man by his will declares how his estate is settled, and then devises—"If my said daughter should die before her mother, or without heirs, and my said wife should marry again, and have an heir male, I bequeath him all my right to that estate;" it is not good as an executory devise, for the contingency is too remote; nor as a contingent remainder, for want of a particular estate; and the son of the wife by her second husband takes nothing. *Right v. Hammond, P. 7 G. Str. 427.*]

[If *A.*, being very sick, devises lands in fee to his brother *A.*, and others to his niece *C.*, and then says, "I give all the rest of my lands to the child or children of which my wife is now pregnant, and their heirs for ever, and if they die without issue under 21, then to my brother *B.*;" the wife bears a son who dies in *A.*'s life, without issue, and under 21; has another child, which also dies soon after in *A.*'s life; *A.* dies seised, without revoking or altering, leaving his wife enfeint of a daughter, who lives; this shall not be construed an executory devise to *B.* to disinherit the daughter heir of the body of testator *A.*, executory devises being contrary to strict rules of law, and only invented to carry into execution the manifest intention; and here are wanting the words "living at the time of the death of such children," which shall not be supplied. *Semb per tot. cur. on two arguments. Driver v. Standring, P. 32 G. 2. 2 Wils. 88.*]

So, if the contingency upon which the executory devise is to commence becomes impossible, the devise will be void. *R. 2 Mod. Ca. 347.*

[Devise of "all the devisor's estates to *A.*, and the issue of her body, as tenants in common, but in default of such issue, or being
" such,

“such, if they should all die under 21, and without leaving issue,” then over; it was holden that all the limitations subsequent to that to *A.* were contingent, and were consequently destroyed by a recovery suffered by *A.* *Doe v. Burnfall*, *B. R. M.* 35 *Geo.* 3. 6 *T. R.* 30. *Burnfall v. Davy*, *C. P. H.* 38 *Geo.* 3. 1 *Bsf. & Pull.* 215.]

[If a man devises lands to *A.* on condition he pays all his debts, if not, to *B.*, and *A.* dies in the testator's lifetime, it is not an executory devise to *B.*, for the first devise is void by the death of the first devisee. *Roe v. Flud*, *C. B. Pasch.* 2 *G.* 2. *Fort.* 184. *Caf. temp. Talb.* 44.]

[Executory devises began soon after 29 *H.* 8. *Ibid.*]

[In queen *Elizabeth's* time. *Marks v. Marks*, *Str.* 130. 3 *T. R.* 93.]

[It was some time before executory devises were admitted by the courts of law, but being found of general utility, they were established in the time of *Charles the First.* *Per* *Ld. Kenyon* *C. J.* 3 *T. R.* 765.]

When a remainder shall be contingent, or vested, *vide Estates*, (B 16, 17.)

(N 18.) What Words give a present Estate.

[If a devise be to *A.* for life, remainder to *B.*, and *A.* die in the testator's lifetime, and then the testator die, *B.* shall take presently. 2 *P. W.* 331. *Vide Chancery*, (3 *Y* 8.) *Vide post.* (N 19.)]

[And if it be to *A.* and *B.*, and *A.* die in the testator's lifetime, *B.* shall take the whole. *Id. ibid.*]

If a man devises to *A.* until *B.* attains his age of twenty-one years, and then to *B.* and his heirs; *B.* has an estate in remainder vested in him immediately by the devise; for *A.* had it for years till *B.* shall attain his full age, and therefore, if *B.* dies before his full age, his heir shall take. *R.* 2 *Mod.* 290. [1 *Bl. Rep.* 519.]

So, if a devise be to *A.* for 50 years if he lives so long, and after the term to the heirs male of the body of *A.*, remainder to *B.*; the limitation to the heirs male of the body of *A.* being void, the remainder to *B.* vests immediately. *R.* 1 *Sal.* 226.

[So, if a devise be to *A.* a protestant, for life, remainder to *B.* a papist, for life, remainder to *C.* a protestant; *A.* dies, *B.* being a papist is disabled to take, and *C.* shall take presently, as if the remainder had been to a monk. 2 *P. W.* 362.]

[If, in this case there be a remainder to trustees for the life of *B.*, in trust to let *B.* take the profits, and to preserve the contingent remainders; the trust to let *B.* take the profits is void, but that to preserve the contingent remainders good, and the grantor and his heirs being protestants shall have the profits during the life of the papist. *Id. ibid.*]

So, if a devise be to *A.*, and before he comes to 21 years of age, to my executor; *A.* has a present interest, and if he dies within age, his administrator shall have it. *Per* three *J.* 2 *Bul.* 123.

[If testator devises lands to trustees, in trust for the benefit of his nephews *A.* and *B.*, to lay out the rents for their maintenance, and putting out during their minority, and when and as they attain 21 respectively, the premises to remain to *A.* and *B.*, and their heirs equally;

equally; this is an immediate gift to *A.* and *B.*, with a trust to be executed for their benefit during their minority, and if one dies under age without issue, his moiety goes to the other, and not to testator's heir-at-law. *Goodtitle v. Whitby*, *H.* 30 G. 2. 1 *B. M.* 228.]

If a devise be to *A.* of goods to be delivered at his age of 21 years, and if he dies before 21 then to *B.*, if he dies before, *B.* shall have them immediately. *R. Bend.* 35. 1 *And.* 33.

So, if a devise cannot take effect as a remainder, it shall be a present interest: as, a devise to *A.* for years, remainder to *B.* in fee; takes the freehold immediately. *R. Cro. El.* 878. *Noy*, 43.

If chattels personal are devised to *A.* for life, and if he has a son, to the son; if *A.* has no son, or such son dies without issue, to *B.* for life, and then to *C.* his son; *A.* has no son, and *B.* dies in the life of the testator; the interest vests in *C.* *R. Ca. Ch.* 130.

If a devise be to *A.* for life, and there is no such person in esse, remainder to *B.*, he shall take immediately. *Pl. Com.* 414. a.

So, if a devise be to *A.* for life, or in tail, and after his death without issue, to *B.*, and *A.* dies in the life of the testator, having issue; yet *B.* shall take immediately. *R. Cro. El.* 423. *R. Dy.* 122. a.

So, if *A.* refuses. *Cro. El.* 423. *Pl. Com.* 414. 1 *Co.* 101. a.

So, if *A.* be incapable, as a monk, &c. *Perk. Devise*, 566, 567. *Dy.* 127. b.

So, if a devise be to *A.* and *B.* and their heirs, and *A.* dies before the testator, *B.* shall have the whole. *R.* 1 *Sal.* 238.

[A devise of lands to *A.* till *B.* attain the age of twenty-one, and then to *B.* in fee, gives *B.* a vested interest, descendible to his heirs if he die before twenty-one. *Morris v. Underdown*, *C. P. M.* 15 G. 2. *Willes*, 293.]

[If a lease for years is devised to a man, and if he die without issue, remainder over, the whole interest vests in the first taker; but if it is a lease for lives, the first taker has a power during his own life, to dispose of it; if he does not, on his death it vests in the remainderman as special occupant. *Saltern v. Saltern*, *T.* 1742, 2 *Atkyns*, 376.]

[If a term be bequeathed to *A.* and his lawful heirs, and if he die, and have no lawful heir, then to *B.*, the limitation to *B.* is good. *Goodtitle v. Pegden*, *B. R. M.* 29 Geo. 3. 2 *T. R.* 720.]

What words give an estate in futuro. *Vide ante*, *Executory Devise*, (N 16, 17.)—*Vide post.* (N 19.)

(N 19.) When in Reversion, or Remainder.

By the *st.* 32 *H.* 8. 1. and 34 (or 34 & 35) *H.* 8. 5. all persons who have lands, &c. in reversion, or remainder, may devise, &c. *Vide ante*, (N 18.)

If a lessor disseises a lessee for life, and makes a lease to *A.* for the life of the first lessee, remainder to *B.* in fee, and the first lessee enters; yet *B.* may devise his remainder.

But the devise of a remainder, after an estate in fee, will be void, as well as a grant. *Vide Estates.*

When a Devise commences upon a Limitation, *Vide Limitation, in Condition (T).*

(N 20.)

(N 20.) When upon a Contingency.

If a devise upon a contingency be in the disjunctive, if the one or the other happens, the estate commences : as, if a devise be to *A.* and *B.*, and other children, and if any of the children die within age, or not married, his share shall go to the survivors ; if *A.* dies before marriage, though he be of full age, his part goes to the survivors. *R. 2 Ver. 388. Vide Executory Devise, ante, (N 16, 17.)—Contingent Remainder, in Estates, (B 16, 17.)—Vide Condition, (B 5.)*

If a devise be to *A.* for life, and afterwards to the child of which *A.* is enfeint, and if such child die within age, then a third part to *A.*, her executors and administrators ; *A.* shall take a third part, tho' she was not enfeint. *R. Eq. Ca. 74.*

But if the disjunctive be annexed to the act which ought to happen before the commencement of the estate, the estate does not commence, tho' one part happens : as, if a devise be to *A.* and his heirs, and if he dies before he attains 21, or has issue, to *B.* If *A.* attains 21 years, tho' he afterwards dies without issue, *B.* shall not have it. *R. Pol. 645.*

[A devise, that in case *A.* dies before 21, and his mother without other children, then lands, leaseholds, Exchequer-annuities, and personal estate to *B.*, is good for them all on that contingency. *Studholme v. Hodgson, T. 1734, 1 P. W. 300.*]

[*A.* seised in fee has a son *B.* and a sister *C.*, and devises lands to his son *B.* in tail-general, and if his son *B.* should die without issue, and his wife should survive him, then the wife to have the premises for life, and after her decease to the testator's sister for life, and after her decease, the testator's son being dead without issue as aforesaid, remainder to *C.* in fee ; *B.* the son dies without issue, but the testator's wife dies before him : *C.* is not entitled to the remainder in fee, because the contingency of the testator's son dying without issue in the lifetime of the wife, is annexed to all the devises over. *2 P. W. 290.*]

[Devise to *Margaret* (an only child) for life, remainder to the first son of her body, "if living at the time of her death," and the heirs male of such son, and for default of such issue to the second son of her body, "if living at the time of her death," and the heirs male of such second son, &c. ; and for default of such issue male, remainder to *A.* *Margaret* had one son, who died in her lifetime leaving a son, and it was holden that *Margaret* took only an estate for life, and that neither her son or grandson took any estate, the contingency upon which such estate depended not having taken effect, but that *A.* was entitled to the remainder. *Radcliffe v. Bagshaw, B. R. H. 36 Geo. 3. 6 T. R. 512.*]

[Devise of freehold lands to the wife for life, and after her death to such child as his wife was enfeint of, in fee ; "provided, that if such child, as should happen to be born as aforesaid, should die before 21 without issue, the reversion of one third should go to the wife, and the reversion of the other two thirds to two of the devisor's sisters." The wife was not enfeint, and it was holden that the remainder over depended on the birth of a child and its dying under 21 and without issue, that as those events never happened, the remainder over did not take effect, but that the heirs at law of the devisor were entitled

entitled to take. *Fulham v. Wickett*, C. P. M. 15 Geo. 2. *Willes*, 303. *Qu. Vide Mr. Durnford's note (a)*, p. 315.]

(N 21.) Regard shall be had to the Testator's Death.

[A will must always be construed as it ought to have been at the instant of the testator's death. *Dougl.* 494, *in note*.]

If a devise be to *A.* in tail, *remainder to the next of his name*, and at the death of the testator he has a sister unmarried, who was the next of his name; she shall take, tho' she was married at the death of *A.* without issue, by which she lost her name. *R. Cro. El.* 532. 576. *Vide Chancery*, (3 Y 17.)

But if the sister married before the death of the testator, by which she lost her name; she shall not take, but his next heir male. *R. Cro. El.* 532. 576.

[If a man devise lands to his younger sons at twenty-four, and in the mean time the rent and profits of the premises to his eldest son, and die; and the eldest son devise all *those* rents and profits of the premises to his younger brothers, but not to be paid to them till twenty-four; only the rents and profits accruing from the death of the elder brother shall pass. 1 *P. W.* 500.]

[So, if one possessed of a term for years devise all the profits of it to *J. S.*, only the profits accruing from the death of the testator shall pass. *Id.* 503.]

But the death of the testator shall not be regarded in exclusion of the intent at the time of the will made: as, if a man devises all his lands in *A.*, and afterwards purchases more lands there, these do not pass. *Pl. Com.* 343. *b.* *Vide ante (M)*.

If a devise be to the wife of *B.* who dies, and his wife marries *D.*, and then the testator dies; the wife of *D.* shall take. *Pl. Com.* 344. *b.*

Or, to *A. dean of P. and his chapter*, and a new dean is made in the testator's lifetime; the dean and chapter shall take. *Pl. Com.* 344. *b.*

If a devise be to the next of his blood; the next at the time of the will shall take. *Per two J.* 2 *Rol.* 256.

If a man devises to *Francis Carter* a house in *B.*, and all other messuages, lands, tenements, and hereditaments in *B.* and elsewhere, to *James Lamas* and his heirs; if *Francis Carter* dies in the life of the testator, *Lamas* shall not take the house devised to him. *R. P.* 11 *Geo.* in *C. B. inter Wright and Hall*.

(N 22.) Words shall not be strained to disinherit an Heir-at-Law.

There shall not be a strained construction of words to disinherit an heir, and therefore whatever is not expressly disposed of descends to the heir: as, if a man devises *the demesnes of a manor to his wife for life, and the services to her for 15 years, and the whole manor after the death of his wife to a stranger*; the heir shall have the services after the 15 years during the life of the wife. *R. Mo.* 7. *Dal.* 5. *Vide Implication, ante.* (N 12, 13.)—*Vide Chancery*, (3 P 3.)

If a man has two daughters by different venters, and devises a moiety to his wife for seven years, and that his eldest daughter shall enter into the other moiety at her marriage, and if his wife be enscint with a son, he shall have the land, if with a daughter, she, with his two other daughters, shall have the whole, and dies, having two daughters, and his wife not enscint;

feint; she enters into a moiety and within the seven years the eldest daughter marries and enters into the other moiety, and within the seven years the youngest daughter dies without issue; the uncle of the youngest daughter, being heir of the whole blood, shall have a full moiety; for the words, that *the eldest shall enter at her marriage*, do not import a devise of a moiety to her, but denote when she shall have possession of it. *R. Bend. pl. 278. Dy. 342. a. Vide 1 And. 47. Vide ante, (N 13.)*

If a devise be *to an heir until B. attains 21, and then to him*; the heir shall have a fee until the contingency happens. *R. 1 Leo. 101.*

But such a construction ought to be made of a will, that all the words may stand, if it be possible. *Latch, 39. [2 T. R. 217. 221. 224.]*

So, where the words are not ambiguous, the construction shall not be in favour of the heir. *2 Ver. 340.*

[But if *A.* by will devises his lands, &c. to himself for life, to his wife for life, to their issue in tail, then to his two brothers *R.* and *M.* to be divided; if *R.* has no sons, his *whole lands and estate to M.* in tail-male, he paying, &c. after *the same estate* shall fall to him; if *M.* has no sons, his lands to go to his nephew *T.* and his heirs, he paying, &c. after his *estate* shall fall to him; if *T.* has no sons, then his *said estate* to go to the daughters of *R.* and *M.*; in default of them, to the daughters of *T.*; in default, to testator's right heirs. The word *estate* passes only an estate for life to the daughters of *R.* and *M.* *Rogers v. Briggs, P. 11 G. 2. Andr. 210.]*

[So, if testator says, *as touching the disposition of all my temporal estate, &c. Item, I give my nephew A. two houses at B.*; *A.* takes only estate for life. *Frogmorton v. Wright, P. 13 G. 3. 3 Wilf. 414.]*

[The devisor devised lands to *A.* till *B.*, *C.*, and *D.* attained their respective ages of twenty-one, and then to *B.*, *C.*, and *D.*, and their heirs, equally to be divided between them as tenants in common, charged with an annuity of 10*l.* by *B.*, *C.*, and *D.*, equally and proportionably out of their several estates; then he devised other lands to *A.* in fee; and gave all the rest, residue, and remainder of his real and personal estate, not before given, to *E.*, her heirs, executors, &c.; and directed that his debts, &c. should be paid out of the estates given to *A.* and *E.*, *B.* died before the devisor, and it was holden that the devise to *B.* was a lapsed devise, and that the heir at law of the devisor (not the residuary devisee) was entitled to *B.*'s share, as not having been disposed of by the will. *Morris v. Underdown, C. P. M. 15 Geo. 2. Willes, 293.]*

(N 23.) An Exception shall be expounded liberally.

So, an exception shall be liberally expounded: as, if a devise be *to A. in tail, to B. in tail, and all the remaining part of his estate to D., except that which he has given to A. and B.*, the exception extends to the fee of the estate devised to *A.* and *B.* *R. 3 Mod. 228.*

If he devises *all his goods and furniture in such a house to his wife for life, and afterwards to his eldest son, except the pictures*; the pictures hung up as furniture at the time of the will, or afterwards, and pictures in boxes, do not pass to the wife. *R. 2 Ver. 538.*

But where a devise was to charitable uses, of lands, *except the wood, underwood, and timber trees*; the soil of the wood is not within the exception. *R. 1 Ch. R. 134, 5.*

(N 24.)

(N 24.) The Exposition shall be according to the Intent of the Testator.

So, a construction shall be made, if it may be, to support the intent of the testator.

As, if *A.* having lands in four counties, devises those in three counties to his wife in part, and part to others, and afterwards devises all generally to his wife for the benefit of his son; this shall be extended only to the land in the fourth county. *R. Dal. 63.*

[If the intention is barely problematical, the rule of law must prevail. *Cowp. 240.*]

[But where it appears by the will that the testator had a general intention, and also a secondary intention, and they clash, the latter must give way to the former. *Per* *Ld. Kenyon C. J. Candler v. Smith, B.R. E. 38 Geo. 3. 7 T. R. 533. Doe v. Applin, 4 T. R. 82.*]

[So, if testatrix devise to *H.* an intire farm in the occupation of *B.*, (which included a small parcel of marsh land,) and afterwards by the same will devises all her marsh land to *M.*, she having a large estate in marsh lands, beside that parcel in the occupation of *B.* let to a separate tenant; the latter devise shall not dismember the parcel from the farm to which it belongs. *2 Bl. Rep. 975.*]

[Where a man devised lands in trust to pay the rents and profits to his daughter (whose husband was then living) for her life, notwithstanding her coverture, and not to be subject to any control, &c. of her husband, nor liable to any debts which he had or should contract; and afterwards, taking notice of the death of the husband, by a codicil ratified and confirmed his will: it was held, the daughter was entitled to the rents and profits, free from the control of any future husband. *1 Term Rep. 193.*]

[So, if a man devise his messuage and tenement in *E.* to *A.* and his heirs, and all the rest and residue of his messuages, lands, tenements, and hereditaments to *B.*, his heirs and assigns for ever, and *A.* dies in the lifetime of the testator, the messuage in *E.* shall go to the heir at law, not to the residuary devisee. *Wright v. Hall, C. B. P. 11 G. Fort. 182.*]

[So, rest and residue of lands undevised must be expounded, undevised at the time of making the will, not at testator's death. *Roe v. Flud, C. B. P. 2 G. 2. Fort. 184.*]

[*A.*, possessed (*inter alia*) of lands of 100 *l. per ann.*, (the legal estate in trustees, and he entitled inequity to an immediate fee therein,) devises to his sister *E.* (who is his heir at law) all his lands, &c. except the reversionary estates hereinafter mentioned, then reciting that he was seised of and entitled unto the inheritance and reversion of all the estates *G.* and *H.*, after the death of *H.* and his wife, he gives them to his three sisters in fee as tenants in common; the 100 *l.* lands pass by the first devise to *E.*, and not by the other to the three sisters. *West v. Morris, P. 11 G. 2. Andr. 201.*]

[If *A.* devises to *R. M.*, eldest son of his nephew *R. M.*, and the first heirs males of his body, and the heirs males of his body, and in default, to the second son of the said *R. M.*, with directions that to whomsoever the estate shall come, he shall pay certain sums to persons then in being; the remainder is not to the second son of *R. M.* the first

first devisee, but to the second son of *R. M.* the nephew of testator. *Minsball v. Minsball*, *H.* 1737, 1 *Atkyns*, 411.]

[If *A.* possessed of 5000*l.* old *South-Sea* annuities, by his will gives 5000*l.* old *South-Sea* annuities to his niece *B.*, and 5000*l.* old *South-Sea* annuities to his cousin *C.*, and his lands to his nephew *D.*, whom he makes residuary legatee, and dies, leaving personal estate more than sufficient to pay all legacies; *B.* and *C.* are each entitled to 5000*l.* old *South-Sea* annuities, and so much shall be purchased out of the personal estate for that purpose. *Purse v. Snaplin*, *M.* 1738, 1 *Atkyns*, 414.]

[If *A.* devises a house to a charity-school, and directs the rents to be applied for its benefit, so long as it shall continue to be endowed with charity; and also reciting that 1000*l.* is due to him from *J. S.*, devises it to the *Coopers' Company* to build alms-houses at *R.*, and at his death the debt from *J. S.* is only 365*l.*, the house is only given *quousque*, and when it ceases it shall fall to the heir; and tho' the debt falls short of the sum supposed by the testator, yet that does not defeat the legacy, and as the charity cannot take place strictly according to testator's intent, it shall as far as may be, and therefore the interest of the 365*l.* shall be paid to the alms-people in the alms-houses of the company. *Attorney-General v. Pyle*, *H.* 1738, 1 *Atkyns*, 435.]

[If a man devises his real estate to trustees for certain uses, and says his will is and he bequeaths it to *A.* for life, and no longer, provided he alter his name and take testator's, and after his decease to such son as he shall have, taking his name, and for default of such issue, then to *B.* his heir at law, and gives *B.* the residue, and makes him executor; testator dies, *A.* has two sons, the eldest takes the name, and dies; *A.* must by necessary implication, to effectuate the manifest intention of testator, be construed to have taken an estate in tail-male. *Robinson v. Robinson*, *T.* 1751, per *B. R. M.* 1756, 3 *Atkyns*, 736.]

[If a man devises to his daughter 3500*l.*, which with 6000*l.* she is entitled to by my marriage-settlement, and 500*l.* from her father-in-law, make up 10,000*l.* which I design for her fortune; and it appears she is entitled to 5000*l.* only by the settlement, she shall have 4500*l.* by the devise. *Milner v. Milner*, *T.* 1748, 1 *Vesey*, 106.]

[If *A.* by will directs that 4000*l.* in money be taken out of his estate by instalments of 500*l.* per ann. and laid out in securities in the names of his executor and *B.*, and when all raised, if *B.* is willing to have it laid out in land, to purchase in the names of executor and himself, and the profits to go to *B.* for life, to his wife for life, to their eldest son then living, if he dies without issue male, to be equally divided among the daughters; if wife dies without issue, then legacies out of it to *C.*, *D.*, &c. and the residue to be divided among his nearest relations; if lands not purchased, to remain in government securities, and to be and enure to such purposes as if lands purchased; to comply with testator's intention, it shall be expounded that he meant this money to be taken as land. *Johnson v. Arnold*, *M.* 1748, 1 *Vesey*, 169.]

[If a man seised in fee of lands in *A.* and *B.*, and also of the reversion in fee of other lands in *A.* and *B.*, under a settlement made by him on the marriage of his eldest son, devises to his wife certain specific lands in *A.* and in *B.*, "and also all other lands, tenements, and " hereditaments in the said counties of *A.* and *B.*, or either of them,
" whereof

"whereof I am seised in fee-simple, or of which any other person is seised in trust for me, together with their and every of their appurtenances;" this shall not carry the reversion, if there are words and expressions, either direct or to be clearly collected in the will, which restrain them to the lands in possession. *Strong v. Teatt*, H. 33 G. 2. 2 B. M. 912.]

[If a man, on the surrender of *A.* and *B.* his wife, is admitted to copyhold in *C.* on a mortgage, and in possession, but the equity not foreclosed, surrenders this with other lands, and all his estate, right, title, &c. as well in law as in equity, to the same, to the use of himself for life, then to such persons as he should appoint, and in default to his right heirs, and is admitted accordingly, subject nevertheless to the several conditions in the court-rolls, (mentioning *inter alia* the mortgage-condition,) and afterwards by will reciting *B.* (*A.* her husband being dead) owed him a considerable sum, gives her time to pay it, and 50 *l.* out of the debt; and all his lands, tenements, and hereditaments, within and parcel of *C.*, he gives, subject to certain charges, to his son *D.* and his wife, and to the heirs of their body, and makes him residuary legatee and executor; this does not pass the mortgaged premises as land, but gives the sum due as a debt, and part of his personal estate. *Martin v. Moulin*, P. 33 G. 2. 2 B. M. 969.]

[If a man seised of a farm at *B.*, which he has let to *A.*, reserving the wood and timber, makes his will, and (*inter alia*) devises to his wife his farm at *B.*, in the tenure of *A.*, the wood passes; for "in the tenure of *A.*" is descriptive, not restrictive. *Goodtitle v. Paul*, M. 1 G. 3. 2 B. M. 1089.]

[*A.* purchases three messuages and a few acres belonging to them all together at the same time, and being in possession, soon after makes his will, as to such worldly estate wherewith God has blessed me, &c. gives his wife, sole executrix, all his personal. And likewise those three messuages with all houses, barns, stables, stalls, &c. that stand upon or belong to the said messuages. The lands pass with the houses as if he had devised all that farm with the appurtenances which I purchased of *B.* *Gulliver v. Poyntz*, M. 11 G. 3. 3 Wils. 141.]

[If he devises land to *B.* upon condition that he pay 5 *l.* per ann. to *D.*, and afterwards gives several legacies, and then says, that for non-payment of the legacies, they may distrain, and if no distress, re-enter, &c. this does not extend to the 5 *l.* per ann. *Semb. Pol.* 404.]

If *A.* has issue *B.* and *C.*, and *B.* has issue a son, and *C.* a daughter only, and *A.* devises to *B.* for life, then to his son in tail, and for default of such issue, to the daughter in fee, paying such sums, provided if *C.* have issue a son my lands shall go to such son and his heirs, paying as the daughter ought to pay; *C.* has issue a son; the remainder only, in default of issue to the son of *B.*, goes to the son of *C.* by force of the proviso. *R. 2 Mod.* 293.

[*A.* devise to the first and eldest son, not heir at law to his father, is a good devise to the second son. *Semb. Marwood v. Darrel*, H. 8 G. 2. B. R. H. 91.]

[If a man in his will says, as to his worldly estate he gives, &c. and then after several devises, gives all his estate at *A.* to his mother for life, and to his nephew after her death, if he will but change his name; if not, gives him only 20 *l.* a-year, to be paid him for life out of *A.*, which he gives her on his nephew's refusing, to her and her heirs

heirs for ever; an estate in fee-simple passes to the nephew. *Ibbetson v. Beckwith*, M. 9 G. 2. C. T. T. 157.]

[If *A. B.* has two sons, *M. B.* and *A. B.*; begins his will, I *A. B.*, and devises lands to *M.* in fee; proviso if *M.* dies before me, then my son *A. B.* to enjoy the estate as *M.* should have done; also if *M.* shall die before the said *A. B.*, he the said *A. B.* junior shall enjoy the estate as *M.* should have done; and *M.* survives testator, and dies, leaving issue, and living, *A. B.* the brother; the issue of *M.* shall have the land; for the name *A. B.* without junior, plainly means testator. *Per Curiam. Goodright v. Hall*, M. 29 G. 2. Wilf. 148. *Sed qu.* for the said *A. B.* should be referred to the *A. B.* last before mentioned, which is *A. B.* the son; and further it is tautology, being the same event mentioned immediately before.]

[If a man seised in fee of copyhold in *M.* surrenders, and makes his will thus, "I give my said lands to my daughter *A.*, her heirs and assigns for ever; if she dies before 21, and have no issue, my nephew *B.* shall have my said lands; I will my wife to surrender my estate in *N.* (which is surrendered to us, our heirs and assigns) to my said daughter *A.* and her heirs; and as *B.* is heir at law to my daughter *A.* if she dies without issue, I will him to surrender the last premises to my nephew *C.* in fee, or else to have no benefit of this will; and I will my nephew *C.* shall have the lands in *M.*;" *B.* takes only an estate for life. *Roe v. Holmes*, M. 31 G. 2. 2 Wilf. 80. *Sed qu.* for testator intended *B.* should surrender an estate in fee, in consideration of this devise.]

[If *A.*, cestuy que trust of a term, soon after purchases the fee in his own name, and devises in fee to his heir whom he makes residuary legatee and executor, who dies; the term shall go with the inheritance to the heir, and not to the personal representative of the devisee. *Goodright v. Sales*, P. 7 G. 3. 2 Wilf. 329.]

[If a man devises lands to his eldest son *A.* and his heirs, after his mother's decease; to his son *B.*, all that belongs to *S.* and *P.* land, and to his heirs after his mother's decease; to three daughters 100*l.* each at 21; to his son *C.* 100*l.* at 21; and in case *A.* or *B.* die, then *C.* to have *S.* and *P.* land; it shall be understood, that testator intended their dying without issue and under age; therefore, if *B.* dies after 21, *A.* shall have *S.* and *P.* land, as heir-at-law, and not *C.* *Strong v. Cummin*, P. 32 G. 2. 2 B. M. 767.]

[If a man having a house, and two tenements, devises the house to *A.* his son-in-law for life, he paying yearly 40*s.* to *B.*, and after *A.*'s death to *B.*, *C.*, and *D.*, and devises to *S.* the two tenements, she paying thereout 40*s.* a-year to her sister *E.*, and gives 20*s.* a-piece to two other sisters; this shall be construed an annuity for life to *E.*, and therefore *S.* takes a fee in the two tenements. *Baddeley v. Leppingwell*, T. 4 G 3. 3 B. M. 1533.]

[If a woman makes a will of all her worldly estate, and gives her son *A.* and his heirs for ever a malting, &c., to her son *B.* (an infant) a house, &c. charged with 50*l.* to be paid her daughter *C.* out of the yearly rents of the said house; and if *B.* dies before age, gives the house, &c. to *C.*, *D.*, and *E.*; *B.* takes a fee; for the limitation over being only on the contingency of his dying a minor, shews testatrix's intention to have been such. *Frogmorton v. Holyday*, H. 5 G. 3. 3 B. M. 1618.]

[If a man devises lands to his nephew *B.*, the son of *A.*, for life, and the heirs male of his body; and for want of such issue to *C.* another son of *A.* for life, and the heirs male, &c. and for want, &c. to *D.*, another son of *A.* for life, and the heirs male, &c. and for want, &c. “then to every son and sons of *A.*,” and for want of such issue, remainder over; and directs, that whoever comes in possession shall take his testator’s name and arms; and gives several heir-looms; and gives power to make leases and jointures; *B.*, *C.*, and *D.*, and all the remainder-men, die without issue; *A.* has a son *E.* born after the will; *E.* takes an estate-tail. *Evans v. Astley*, *M.* 5 G. 3. 3 B. M. 1570.]

[If a man devises to his nephew *A.*, eldest son of *R.*, in strict settlement, and after his death without issue, to the second son of *R.* for life, then to the first son of such second son, and the heirs male of the body of such second son, then to the third, fourth, &c. sons of such second son of *R.*, and the heirs male of the body of such third, &c. sons; and *R.* had no second son at the time of making the will, but afterwards has *B.* his second son, *B.* takes an estate-tail. *Chapman v. Brown*, *H.* 5 G. 3. 3 B. M. 1626.]

[*A.* devises lands to his wife for life, his daughter for life, to his grandson *B.*, second son of his daughter, and the heirs male of his body, for want of males to females, for want of such to such other son or daughter; if *B.* should live and be the eldest, then to such son as shall be second at her death: all the sons except the eldest take successively in tail. *Fenn v. Lovvendes*, *T.* 8 G. 3. 4 B. M. 2246.]

[*A.* devises his estate to a child unborn, if a son, and to his son *John* when the infant shall attain 21; in another clause declares none of his children shall sell his estate for longer than his life, and to that intent gives his estate to *John* and the infant for their lives, remainder to preserve &c.; remainder to the heirs of the bodies of said sons, remainder to his daughters for life, remainder to preserve, &c. remainder to heirs of bodies of daughters. The testator’s intention is manifest to give *John* an estate for life only, and this intention controls the legal operation of the word *heirs* as a limitation, and makes it a word of description, and the heir would take as a purchaser. *Per Mansfield C. J. Aston and Willes J. contra Yates*, who held it an estate-tail in *John*. Reversed on error in *Exchequer-Cham.* 29 Jan. 1772. Error in Parliament still depending. *Perrin v. Blake*, *H.* 10 G. 3. 4 B. M. 2579.]

[If a man seised in fee of gavelkind lands, devises to *A.* wife of *B.*, and the heirs of her body, as well females as males, and their heirs and assigns; *B.* has two daughters at the time of making the will; she dies before testator, they survive him; they take as purchasers, for they could take no other way. *Doe v. Laming*, *M.* 1 G. 3. 2 B. M. 1100.]

[One possessed of three species of estates in *Hampshire*, viz. one by articles wholly *executory*, another *executory in part*, and a third (being an advowson) completely *executed* by a recent conveyance, devised to his wife thus; “all the manors, messuages, *advowsons*, and hereditaments in *Hampshire* for the purchase whereof I have already contracted and agreed, or, in lieu thereof, the money arising by the sale of my real estate in *Lincolnshire*,” (with directions for completing the contracts). The *advowson*, the purchase of which was completely executed

executed before the making of the will, shall pass to the wife. *Cont.* 2 *Bl. Rep.* 930; but judgment reversed in *B. R. Cowp.* 94.; and judgment of *B. R.* affirmed in *Dom. Proc.* *Sed quare, vide* 2 *Bl. Rep.* 933.]

[*A.* having three daughters, *B.*, *C.*, and *D.*, by will gave a small legacy to *B.* and *C.*, and then gave a leasehold estate to *D.*, "but if she die without having child or children," then "to *B.*, and after her to her child or children;" *D.* had a child, who died in her lifetime: it was holden, as the construction which best effectuated the purpose of the testator, that *D.* took the absolute interest in the term. *Weakley v. Rugg, B. R. T.* 37 *Geo.* 3. 7 *T. R.* 322.]

[*A.* by will bequeathed to his wife (besides some other legacies) a leasehold estate at *N.* for her life, and a leasehold estate at *W.* to *B.*, and by his codicil he directed that the bequests to his wife in his will should be in full of all claims she should be entitled to on his real or personal estate (except the estate for life of his wife in the premises at *W.*): it was holden that the wife was not entitled to the estate at *W.* by the codicil, *W.* having been written by the testator in mistake for *N.* *Skerrat v. Oakley, B. R. H.* 38 *Geo.* 3. 7 *T. R.* 492.]

But if the intent be contrary to the rules of law, it shall be void. 2 *And.* 10.

And therefore, such an estate cannot be made by a will, which cannot be created by deed. 2 *And.* 11.

(N 25.) When explained by Averment.

So, words of a will applicable to two persons, or things, may be ascertained by averment: as, if a devise be to *John* his son, and he has two sons of that name. *Vide Eq. Ca. Abr.* 212. 231, 2. 5 *Co.* 68. 2 *P. W.* 137. *Vide Chancery*, (3 A 2.)

But generally, an averment shall not be allowed to expound the words of a will: as, if *A.* devises to his youngest son in tail, afterwards to the heirs of the body of his eldest son, remainder to his daughter in fee, and the youngest dies without issue in the life of his elder brother; evidence shall not be admitted to prove, that it was the intent that the daughter should not take till both the sons died without issue. *R.* 2 *Leo.* 70.

[So, if testator devises 1000*l.* to *A.*, and in case of his death to his wife, and *A.* survives testator, dies, and his wife receives the 1000*l.*, it shall be assets in her hands, and evidence shall not be admitted to prove testator intended only the interest of 1000*l.* to *A.* for life, and his wife to have the principal if she survived. *Loupfeld v. Stoneham, M.* 20 *G.* 2. *Str.* 1261.]

(O) When a Man takes by a Devise.

IF there be a feoffment to the intent to perform his will, and after he devises the same land to *B.* in fee; *B.* takes by the will, and not by the feoffment. *Co. L.* 271. b.

So, if there be a feoffment to the uses of his will. *R.* 1 *Vent.* 194.

[If a man devise his real and personal estate to trustees, and then executes two deeds, conveying his real, and granting his personal estate to the same trustees, proviso they shall be void on tender of 10*s.*, and keeps them in his own custody; they take by the will, not by the deeds. *Lloyd v. Spillet, M.* 1734, 3 *P. W.* 341.]

But if the feoffment be to *B.* for such estate as shall be limited by his will; *B.* takes by the feoffment, and the will is only a direction of the uses. *Co. L. 271. b. R. Cro. El. 878. 2 Cro. 31. 6 Co. 17. b. Mo. 567.*

Or, to such uses as shall be declared by his will. *R. 1 Vent. 194. R. Jon. 8.*

So, if the feoffment be to the use of the feoffee and his heirs, provided that he may dispose by his will. *1 Vent. 194.*

So, if the devise would not be effectual for the whole if he took by the will, he shall take by the feoffment. *Semb. Cro. El. 878.*

[Where the person to whose right heirs an estate is limited, takes no estate himself, there his right heirs shall take as purchasers, *1 Term Rep. 634.*]

(P) Pleading of a Devise.

IF a man pleaded a devise after the *st. 32 & 34 H. 8.* and before the *st. 12 Car. 2. 24.* which changed tenures to common socage, he ought to shew that the land was holden in socage; for it would not be otherwise intended. *Cont. per three J. ad mensam, but Sand. acc. Dy. 329. b.* But it is said in *marg.* to be often adjudged *cont. temp. Eliz.* And this case was denied, *Mo. 279. Semb. cont. 1 Sid. 265. D. acc. per Dyer, Pl. Com. 376. a. R. acc. 1 And. 246. 4 Leo. 195.*

So, if he pleaded a devise before the *st. 32 H. 8.* he ought to shew a custom to devise. *Bend. pl. 145.*

So, if he pleaded a devise of a rent-charge, he ought to plead seisin of land of socage-tenure. *R. Cro. El. 667. Dy. 329. b. in marg.*

So, if a devise was found by verdict, it ought to have been found to be holden in socage: for otherwise it should not be intended. *R. Mo. 279. Dy. 329. b. marg. But it was R. cont. 24 Car. 2 Rol. 697. l. 20. and 1651. ibid. l. 25.*

So, if a man pleads a devise, it is not sufficient to say, that he was seised generally; but he ought to shew, of what estate, that the court may judge that he could devise. *R. Cro. El. 530. [3 T. R. 96.]*

So, if a man pleads a devise of land, he ought to plead, that it was in writing. *Per Holt, Sal. 519.*

So, he ought to shew that the devisor died seised; for otherwise the will does not operate. *Dy. 143. a. 1 Mod. 217.*

But he need not say that he was of full age, &c. for that is not required by the purview of the act, but by a separate proviso. *Pl. Com. 276. a.*

Concerning Devise, vide also Chancery, (3 A 1, &c.—3 Y 1, &c.)—London, (N 4.)

DIGNITARY.

Vide Ecclesiastical Persons, (C 16.)

D I G N I T Y.

(A) Dignity.

THE king is the fountain of all dignity and honour in the kingdom. *Vide in Prærogative, (D 31.) As to the dignity of the king, vide Roy (D).*

And therefore, the king may create a new dignity, which was not before. *R. 12 Co. 81.*

But he cannot create another king in any part of his kingdom. *4 Inst. 287.*

If a foreign king creates any person noble, he shall not be allowed his dignity by the law here. *7 Co. 16. a.*

Tho' our king by his letters of safe-conduct names him by his title of duke, earl, &c. *7 Co. 16. a.*

Or, makes him a denizen by the same title; or, if he be naturalized by parliament. *Dod. Nobty, 4.*

(B) To what Persons it belongs.

(B 1.) To the Nobility, &c.

(B 1.) *As, } PERSONS of dignity are noble, or under the degree the prince. }* of nobility; or, the superior, and inferior nobility. *2 Inst. 583, 4.*

As to the prince, *vide Roy (G).*

(B 2.) *Duke.]* The first duke made in *England* was *Edward the Black Prince*, created 11 *Ed. 3.* *2 Inst. 5. 9 Co. 49. a.*

(B 3.) *Marquis.]* The first *marquis* was *Robert de Vere* earl of *Oxford*, created 8 *R. 2.* *marquis of Dublin* in *Ireland.* *2 Inst. 5.*

(B 4.) *Earl.]* The *earl* had the custody of the county antiently. *Co. L. 168.*

And it was the supreme name of dignity before 11 *Edw. 3.* *4 Co. 49. a. Sal. 509.*

He was always created by letters patent. *Sal. 509. Skin. 518.*

And ought to be earl of some place, within or out of the kingdom. *Skin. 519.*

But there is no need that there be such a place in *England*, or elsewhere. *Sal. 510. Skin. 519.*

(B 5.) *Viscount.]* The first *viscount* was *John Beaumont*, created *viscount Beaumont* 18 *H. 6.* *2 Inst. 5. Pal. 565.*

And he shall have a seat among the peers in parliament. *R. 21 H. 6. Pal. 565.*

(B 6.) *Baron.]* All the nobles are *barons* of the realm; for a superior degree of nobility does not extinguish the inferior. *2 Inst. 6.*

A baron originally was created by tenure, *Sal. 509.* and afterwards by writ or patent. *Vide post. (C 1, &c.)*

(B 7.) *Knight.]* Persons under the degree of nobility who are sometimes

sometimes called the inferior nobility, are *knights, esquires, and gentlemen.* 2 *Inst.* 666.

Knights are baronets, knights of the garter, of the *Bath*, bannerets, and bachelors. 2 *Inst.* 666.

A baronet only has a dignity descendible; who was first created 9 *Jac.* to him and the heirs male of his body. 2 *Inst.* 666.

And if he be created a baronet to him and the heirs male of his body, without reference to some place; it will be a fee-simple conditional, and forfeitable for felony. *R.* 12 *Co.* 81.

If he be created a baronet of such a place; it will be an estate-tail within the *ss. W.* 2. *R.* 12 *Co.* 81.

But the king cannot create a dignity higher than a baronet, and under a baron. *R.* 12 *Co.* 81.

If the fees for a knight made are not paid, an action lies for them. 1 *Rol.* 87.

The fees by an order of King *James I.* were settled at 20 *l.* for knights made by him. 1 *Rol.* 87.

Who was compellable to be a knight, *vide in Homage, (G 4.)*

(B 8.) *Esquire.*] An *esquire* is he *qui in clypeis gentiliis honoris insignia gerit*; and it is not reputed a dignity. 2 *Inst.* 667. *Vide Spel. Gloss. verbo Armiger.*

All nobles of another kingdom, who are not knights, by the common law, are reputed esquires here. 2 *Inst.* 667.

So, all the sons of a peer of this realm. 2 *Inst.* 667.

So, the eldest son of a knight. 2 *Inst.* 667.

So, the eldest son of such eldest son, or of the son of a peer, for ever. *Semb. Dod. Noby, 144.*

So, a man may be an esquire by creation, with a collar of *ss.* and spurs of silver, or by patent. *Noby, 144.*

So, the first born son of such an esquire for ever. *Dod. Noby, 144.*

So, by being chosen esquire to the body of the prince. *Dod. Noby, 144.*

By attendance upon the king's coronation in some employment. *Dod. Noby, 141, 5.*

By employment in any superior office of the kingdom. *Dod. Noby, 145.*

(B 9.) *Gentleman.*] A *gentleman* is he, *qui insignia gentilitia geret*; and differs little from an esquire. 2 *Inst.* 667, 8. *Vide Addition, in Abatement, (F 19, &c. 26.)*

And he may be by his birth, by deeds of arms by a herald, by office, or reputation. *Dod. Noby, 147.*

A gentleman by his birth does not lose his title, tho' he goes to the plough, or be reduced to poverty. *Dod. Noby, 149.*

Or, be bound apprentice to a merchant, or other trade. *Dod. Noby, 150.*

But a gentleman by his office ceases to be such, if he loses his office. *Dub. Noby, 150.*

Vide Abatement, (E 20.—F 19.—H 44.)

(C) How one may be intitled, or how created.

(C 1.) By Prescription.

A Man may have a title to nobility by prescription. *Co. L. 16. a.*

(C 2.) By Tenure:

So, he may be a baron by tenure. *Sal. 509. Skin. 434. 436.*
And such barony goes with the land to the heir male; or otherwise;
as the land is limited. *Skin. 437.*

(C 3.) By Writ.

So, he may be created by writ: as, if the king by writ of summons requires any to come to parliament, and upon that he sits in the House of Peers; he is a baron to him and his heirs. *Co. L. 16. b.*

Tho' there are not words of inheritance in the writ. *Co. L. 16. b.*

And this was the antient way of creation. *Co. L. 16. b.*

And upon such creation by writ, if a baron summoned to parliament dies, having issue a daughter, such daughter shall have the barony. *Skin. 436.*

So, if he has issue several daughters, and all but one die without issue, the issue of such daughter has a right to have a summons to parliament. *R. Skin. 441.*

If he has several daughters, the dignity is suspended till all but one die without issue: or, the king may grant it to any of the daughters at his pleasure. *Skin. 436.*

But he is not a baron of the realm, if he dies before the return of the writ. *Co. L. 16. b. R. 12 Co. 70.*

If he never sits in parliament by force of the writ. *Co. L. 16. b.*

So, a barony may be limited in the writ, to him and the heirs male of his body. *7 Co. 33. b.*

(C 4.) By Patent:

So, he may be created duke, marquis, earl, viscount, baron or baronet, by letters patent. *Co. L. 16. b.*

And the first creation by patent was 10 *Off. 11 R. 2. Co. L. 16. b.*

And by patent the dignity may be limited to him and his heirs, or the heirs of his body, or, heirs male of his body. *Co. L. 16.*

So, it may be limited only for life. *Co. L. 16. b.*

If a patent under the great seal of *England* creates one an earl, he shall be a peer of *England*. *Sal. 510. Skin. 519.*

Tho' a peer of *Ireland* may be created under the great seal, by express words. *Sal. 510. Skin. 519, 520.*

But the king cannot make any one a peer for years only; for it would go to his executor, or administrator. *Co. L. 16. b.*

So, if the king, by letters of safe-conduct, denization, &c. to a noble foreigner, names him by his title; this does not make him a peer of the realm, or noble, here. *7 Co. 16. a. Calvin.*

(C 5.) By Parliament.

So, he may be made noble by act of parliament.

And the dignity may be entailed by parliament : as, the earldom of Oxford. *Jon.* 103.

But, if a noble foreigner be naturalized by parliament ; that does not make him noble here. *Dod. Nobty*, 4.

Or, if a duke, baron, &c. of Scotland, or another kingdom, has a son and heir born in England, by which he is a natural subject ; he will not be noble here. 7 *Co.* 15. *Calvin.*

(C 6.) By Marriage.

So, a dignity may be obtained by marriage : as, if a duke, marquis, earl, &c. marries ; the wife shall be noble for her life. *Co. L.* 16. *b.*

And if a woman marries a duke, who dies, and afterwards she marries a baron ; yet she continues a duchess. *Co. L.* 16. *b.* 2 *Inst.* 50.

If a duke, earl, &c. who has the dignity in fee, has not a son, but several daughters ; the king may confer the dignity on him who marries any of the daughters, as he pleases. 12 *Co.* 111. *Vide Parcenors*, (A 2.)

But if a woman, noble by marriage, afterwards takes a husband under the degree of nobility ; she shall lose her nobility. *Co. L.* 16. *b.* 2 *Inst.* 50. *Dy.* 79. *b.* *Ow.* 81.

Otherwise, if a woman, noble by descent, takes a husband not noble. *Co. L.* 16. *b.* 2 *Inst.* 50. *Per Brook*, *Ow.* 82.

Or, if a queen dowager takes a husband, noble or not noble ; for she by her subsequent marriage shall not lose her dignity. 2 *Inst.* 50.

Yet if a woman, noble by descent, marries to an inferior degree of nobility, as if the daughter of a duke marries a baron, she shall have precedence only as a baroness. *Ow.* 82.

(D) How tried.

IF there be a dispute, whether a man be a peer of the realm generally, it shall be tried by the record of parliament. *Co. L.* 16. *b.* 7 *Co.* 15. *Calvin.* 9 *Co.* 31. *a.* 49. *a.* 19 *Aff. pl.* 24.

But where he claims by descent, tho' he ought to produce the patent of creation, it shall be tried by the country. *Skin.* 520.

If any one becomes heir to a barony in fee, and be not summoned to parliament, he may sue to the king by a petition of right. *R. Skin.* 432.

(E) How forfeited.

IF a nobleman be attainted for treason or felony, he forfeits his dignity, and he and his posterity become ignoble. *Co. L.* 41. *a.* 391. *b.* *Ow.* 82.

But a dignity or nobility cannot be extinguished, except by act of parliament (if it be not forfeited). *Skin.* 437.

It cannot be aliened, or transferred to another. *Jon.* 123. *Ca. Parl.* 4. *R.* that a grant of it without the the king's licence was void. 4 *Inst.* 126, 7.

It cannot be surrendered by deed, or fine, to the king. *R. Ca. Parl. 1. 11.*

It cannot be taken away by the order of the lords in parliament. *R. Sal. 511.*

It shall not be extinguished by the acceptance of another dignity, or title. *Skin. 437.*

So, it shall not be lost by non-claim: for the statutes of limitations do not extend to it. *R. Skin. 437.*

(F) The Privilege of Peers.

(F 1.) To be tried by Peers.

ALL the barons of parliament shall be tried for treason, felony, misprison, or as accessory, at the suit of the king by their peers. By *Mag. Chart. 9 H. 3. 29. non super eum ibimus, &c. nisi per legale judicium parium suorum. 2 Inst. 49. 9 Co. 30. b. Sta. 152, 153. Vide Parliament, (L 16, &c.)*

So, all of the nobility who are peers of parliament.

So, by the common law, which is now affirmed by the *st. 20 H. 6. 9.* all duchesses, countesses, and baronesses, who are noble by descent, creation, or marriage. *2 Inst. 50.*

And marchionesses and viscountesses, &c. tho' not named by the *st. 20 H. 6. 9. 2 Inst. 50.*

So, the queen consort or dowager. *2 Inst. 50.*

And a peer cannot waive his trial by his peers. *Kel. 56. in marg. Mo. 621. 1 Tr. 265. 2 Rusb. 94. Vide post. (F 2.)*

But the nobles of another kingdom, who are not barons of our parliament, shall not be tried by the peers of parliament. By the common law, confirmed by parliament, *4 Ed. 3. 2 Inst. 50. 7 Co. 15, 16. Calvin. 3 Inst. 30. [Vide Scotland, (D 6.)]*

Nor, a woman, noble by marriage, who has lost her dignity by a subsequent marriage under the degree of nobility. *2 Inst. 50. Vide ante, (C 60.)*

Nor, an archbishop, or bishop; for they are not peers inheritable; *Seld. J. P.* if he be not accused in parliament; *4 Seld. 3 vol. 2. p. 1541. 3 Inst. 30.* for they make proxies after plea, and withdraw themselves. *3 Inst. 31.*

So, a baron of parliament shall not be tried by his peers in an appeal, which is the suit of the party. *2 Inst. 49. 9 Co. 30. b. Sta. P. C. 152. a. 10 Ed. 4. 6. b. 3 Inst. 30.*

Nor, in *præmunire*, or other case, except treason, felony, or misprison. *1 Bul. 198. 3 Inst. 30.*

So, he may be indicted for treason, felony, or misprison by jury. *2 Inst. 49.*

And upon such indictment in *B. R.* he may plead his pardon there. *2 Inst. 49. R. 1 Rol. 297.*

And, if he does not appear, process issues there, and he may be outlawed upon it, *per judicium coronatorum. 2 Inst. 49.*

So, the indictment shall be before *B. R.* or commissioners appointed, by a jury of the county where the offence was committed. *3 Inst. 28.*

[Or, before justices of *oyer and terminer. Vide Duchess of Kingston's case. Cowp. 283*]

[And

[And on certificate of an indictment being found, warrant may be granted by a judge of *B. R.* to arrest him; and on the arrest, *B. R.* may grant a *habeas corpus*, on the return of which they may let him to bail on recognizance to appear as well in *B. R.* as before the king in parliament. *Vide* the form of the recognizance, *Cowp.* 284.]

But he cannot confess the indictment, or plead not guilty in *B. R.* 2 *Inst.* 49.

And before plea the king shall make an high steward, who may arraign him, or transmit the indictment by *certiorari* to parliament. *R. Hut.* 131.

By the commission to the high steward, the indictment is recited, and power given to him to receive the indictment, and to proceed *secundum legem Angliæ*; and a command to the peers to attend, and to the lieutenant of the Tower to bring the prisoner, and a *certiorari* of equal date with the commission, for later, to remove the indictment before him *indilate*. 3 *Inst.* 28. *Vide* 1 *H.* 4. 1.

(F 2.) *The manner of trial.*] At the trial of a peer, the king constitutes an high steward *hâc vice*. 3 *Inst.* 28. 1 *H.* 4. 1. a. *De quo vide* *Officer*, (E 5.)

The high steward by warrant requires which serjeant at arms he pleases to summon the peers named in the warrant, to be at *Westminster* on such a day, to try, &c. *Mo.* 621. *Sta.* 152. 3 *Inst.* 28.

So, by warrant, he requires the lieutenant of the Tower to bring his prisoner. *Mo.* 621. 1 *H.* 4. 1. a. 3 *Inst.* 28.

And, by letter, the judges are required to be present, who attend in scarlet, &c. *Keil.* 54.

And a writ goes out of *Chancery* to the lieutenant of the Tower, to bring the prisoner as the high steward shall appoint. 3 *Inst.* 28.

And peers, in commission to find the indictment, may be upon the trial. *R. Keil.* 58.

A precept by the high steward to the serjeant to summon *tot. & tales proceres*, &c. *per quos*, &c. names none particularly. 3 *Inst.* 28.

But they ought to be 12 or more. 3 *Inst.* 28. 30.

At the day appointed the commission is read. *Mo.* 621. *Sta.* 152. 3 *Inst.* 28.

Then the peers are named according to the summons returned. *Mo.* 621. 3 *Inst.* 28, 29.

The prisoner cannot challenge any peer. *R.* 1 *Tr.* 366. 3 *Inst.* 27. 2 *Rusb.* 94. *Vide infra*.

The peers, who appear, take their places according to their dignity. *Mo.* 621. 3 *Inst.* 28, 29. *Sta.* 152.

And afterwards the prisoner is brought to the bar. *Mo.* 621. *Sta.* 152. 3 *Inst.* 29.

And then the indictment is read. *Mo.* 621. 3 *Inst.* 29. *Sta.* 152.

And the prisoner arraigned. 3 *Inst.* 29. *Sta.* 152.

Afterwards the prisoner ought to plead, otherwise he stands mute. *R.* 1 *Tr.* 366. *Vide infra*.

If he pleads *Not guilty*, issue is joined upon it. 3 *Inst.* 29. *Vide infra*.

And there needs no counsel for this; but if he pleads matter of law, counsel shall be assigned him. 3 *Inst.* 29. 2 *Rusb.* 94. 1 *Tr.* 366.

If the prisoner does not appear, the same process shall be against him as upon another indictment, till he be outlawed. 3 *Inst.* 31.

After the indictment read, the peer ought to plead; otherwise judgment shall be against him. *Keil.* 57. 1 *T. R.* 366.

If he pleads *Not guilty*, he puts himself upon his peers. *Mo.* 621. *Sta.* 152. 3 *Inst.* 29. *Vide supra.*

And he cannot waive the trial by his peers, or challenge any of them. *Mo.* 621. *Keil.* 56. 3 *Inst.* 30. *Vide Parliament*, (L 17.) *Vide ante*, (F 1.) *Vide supra.*

And he need not have time allowed for pleading, tho' the indictment be long. *Keil.* 56.

If he does not plead, but confesses the indictment, judgment shall be immediately against him. 1 *H.* 4. 1. *a.*

After plea, the king's serjeants and attorney immediately give evidence against him; and then the prisoner shall answer to it. *Sta.* 152. 3 *Inst.* 29.

Then the constable with his prisoner retires, while the peers consult of their verdict. *Sta.* 152. *b.* 3 *Inst.* 29.

The judges may be asked their opinions in any point: for they are present for the assistance of the court. *Keil.* 54.

And therefore, if the high steward asks a question, they ought to answer tho' it be in the absence of the prisoner. *Keil.* 54.

So, they may deliver their opinion upon a question proposed in point of law, in the absence of the prisoner. *Dub. Keil.* 54.

But they ought not to deliver their opinion, before the trial of a criminal case triable before them. 3 *Inst.* 29.

If the peers, after evidence, being in consult, desire to speak with any of the judges; with assent of the high steward he may go to them. *Keil.* 54.

But the judges ought not to deliver any opinion in point of law, but in open court, *Keil.* 54. in the presence of the prisoner. 3 *Inst.* 29.

And they ought not to speak with the king's counsel privately upon it. 3 *Inst.* 30.

And therefore, if the peers, in consulting of their verdict, desire to speak with a judge, and then ask his opinion in law, he ought to inform them, that he cannot deliver a private opinion, nor without conference with the other judges. *R. Keil.* 54.

If the peers in consulting, &c. desire to speak with the high steward; he cannot speak with them but in the presence of the prisoner. *R. Keil.* 57. 3 *Inst.* 29.

The peers may eat and drink, after evidence given, before verdict. 1 *Tr.* 366. 2 *Rush.* 95.

But the peers ought not to separate or adjourn after evidence, before their verdict. 1 *Tr.* 366. 3 *Inst.* 30. 2 *Rush.* 95.

After a major part of the peers in consult are agreed of their verdict, they again take their places, and the high steward asks of the lowest, and so of each *seriatim*, whether the prisoner be *guilty*, who answers without oath, *guilty*, or, *not guilty*, upon his honour. *Sta.* 152. *b.* 10 *Ed.* 4. 6. *b.* 1 *H.* 4. 1. *a.* 3 *Inst.* 30.

Then the high steward asks for the prisoner, and declares the verdict to him, and gives judgment accordingly. *Sta.* 152. *b.* for the verdict is given in the absence of the prisoner. 3 *Inst.* 30.

If they do not agree, the court may adjourn to the next day: tho it is not usual. *Keil.* 57. 3 *Inst.* 31. And,

And in such case the peers need not continue together, as other juries; but may retire to their houses. *R. Keil. 57.*

(F 3.) As to Oath, Arrest, &c.

So, a peer, generally, shall not be upon oath in trials before them, or when he answers in any court, as a defendant. *Jon. 154. Vide Serement (C).*

So, he shall not be put upon a jury, or assise. *Jon. 153. 9 Co. 49. a. Reg. 179. b. 48 Aff. 6.*

And, if he be, he shall have a writ for his discharge. *Reg. 179. b. R. 48 Ed. 3. 30. b. Dy. 314. b.*

So, an attachment does not go against a peer for a contempt in disobeying an injunction, &c. *Seld. 3 vol. 2. p. 1543.*

So, a peeress, by marriage or descent, shall not be arrested; for a *capias* does not lie against her. *R. 6 Co. 52. b.*

So, a peer shall not be arrested in debt or trespass; for a *capias* does not lie against him. *9 Co. 49. a. 6 Co. 52, 3. Hob. 61.*

And, if arrested by a process which names him a peer, a *superfedeas* shall go. *Sal. 512. 4 Inst. 126. F. N. B. 247. C.*

So, if he has sat in parliament as a peer. *Sal. 512.*

But if he never sat as a peer, nor be named so, he ought to plead. *Sal. 512.* for there shall not be a *superfedeas*; but perhaps he may have a writ to the justices, mentioned *F. N. B. 247.* if he be a peer.

So, a peer shall be in execution upon a statute-staple, statute-merchant, or recognizance. *R. 2 Leo. 173, 4.*

So, execution shall be against his body upon a judgment. *Dub. 2 Leo. 173.*

So, a *capias* lies against a peer in an *homine replegiando*. *Hob. 61.*

So, a peer shall find bail upon a *habeas corpus* to remove a cause. *R. 2 Leo. 173.*

So, a *capias* lies against a peer for an offence to the king immediate as, for felony. *Seld. 3 vol. 2. p. 1546.*

So, for a *rescous* made, &c. *Seld. 3 vol. 2. p. 1546.*

So, a *capias* lies against an earl, baron, &c. in Ireland.

And against a bishop of Ireland; though he is a bishop of the universal church. *Pal. 345.*

DIOCESE.

Vide Parish (A).—Prohibition, (F 9.)

DISABILITY.

Vide Abatement, (E 1, &c.)—Ability.—Alien, (C 4.)—Capacity.—Chancery, (I 1.)—Condition, (M 2, &c.)—Popery, (B 7, &c.)

DISCEIT.

Vide Decept.

Writ of Disceit.

Vide Ancient Demesne, (E 2.)

DESCENT.

When a Man takes by Descent.

EVERY estate of inheritance which a man has, he takes by descent or purchase. *Co. L. 13. b.*

In all cases, where a man derives the estate from his ancestor, he takes by descent: as, if tenant in fee-simple, or tail, dies, his heir takes by descent. *Co. L. 13. b.*

[A charge on the estate does not alter the manner of the heirs taking the land; but if the tenure or quality of the estate be altered, the heir is a purchaser. *1 Bl. Rep. 22.*]

[Where a man devises lands to his right heirs absolutely; the heir may take by descent, as being the better title; but where the lands so devised are subject to a charge, he must take under the will, that he may not defeat the will. *Per Ld. Mansfield C. J. Doe v. Saunders, B. R. E. 16 Geo. 3. Cowp. 422.*]

So, where the ancestor has an estate for life, and afterwards a limitation is to his right heirs, the heir takes by descent: as, if a feoffment be to the use of *A.* for life, remainder to *B.* in tail, remainder to the right heirs of *A.*; the heir of *A.* takes by descent. *Co. L. 22. b. 319. b. R. 2 Co. 91. b. Mo. 284. 719. Pol. 56. 1 Rol. 627. l. 20. 25. 2 Rol. 417. l. 10.*

So, if it be to *A.* and *B.* for life, remainder to the right heirs of him who dies first, and *A.* dies; his heir takes by descent, tho' the remainder could not vest before the death of *A.* *Co. L. 378. b. D. cont. Lit. 258.*

So, if it be to the use of *A.* for years, if he so long lives, and afterwards to *B.* for life, and afterwards to the right heirs of *A.* *Cont. Mo. 719. Popb. 3. 2 And. 138. R. acc. 3 Lev. 406. Dub. 4 Mod. 384. But the court inclined cont. and in the case, 3 Lev. 406. the limitation was to A. and his heirs. Cont. Co. L. 319. b. Semb. acc. where it was limited to the trustees for the life of A. Eq. R. 21.*

So, though the estate for life in the ancestor be created by act in law: as, if a feoffment be to the use of another for life, remainder to *A.* in tail, remainder to the right heirs of *B.* the feoffor; because *B.* cannot have an heir during his life; and by the *st. 27 H. 8.* the possession is executed to the use, the law creates an use to *B.* for his life, till the future use comes *in esse*; and therefore the heir takes by descent. *Co. L. 22. b. Mo. 284.*

Or, if a man covenants to stand seised to the use of *A.* in tail, and afterwards to the heirs male of himself; the law creates an use in the covenantor for his life, and his heir male takes by descent. *R. 2 Mod. 211. 4 Mod. 382.*

Or, to the use of his heirs male by a second wife; he has immediately an estate-tail, and the son by the second wife shall take by descent. *R. 2 Lev. 79. 1 Mod. 121. 159.*

So, if a man upon a conveyance limits a void remainder, by which the reversion results to himself, his heir takes by descent: as, if a man demises for life, remainder to his right heirs, the remainder is void; for he cannot make his heir a purchaser, where he does not part with the whole estate out of himself. *Co. L. 22. b.*

So,

So, if a fine *sur grant & rendre* be to a husband and wife, and the right heirs of the husband, (where the husband was sole seised before,) who render to *A.* for the life of the husband, remainder to *B.* for life, remainder to the right heirs of the husband; the remainder to the right heirs is void: for he cannot make his right heir a purchaser, where he does not part with the whole estate out of himself; and therefore the reversion was in the husband. 2 *Rol.* 414. *l.* 45.

So, if by bargain and sale land be conveyed to *A.* and his heirs, and *A.* dies before enrolment; the heir takes by descent. *Vide Bargain and Sale*, (B 9.)

So, if a man covenants to stand seised to the use of *B.* and his heirs, upon a contingency, and *B.* dies before, and then the contingency happens; the use rises to the heir, who shall take *quasi* by descent. 2 *Rol.* 794. *l.* 45. *R. Pol.* 59. 66.

If *A.* covenants to stand seised to the use of *B.* in tail, and for default of issue, to his own heirs male; his younger son, after the death of the elder leaving a daughter only, takes by descent. *R.* 2 *Mod.* 211.

[So, if a man grant to *A. B.*, remainder to his own heirs male; his heirs male take by descent. But if such a limitation be made by will, or by a third person by deed, the heir male takes by purchase. 2 *Bl. Rep.* 687.]

If *A.* limits an estate to his wife for life, and afterwards by a subsequent deed limits it to the heirs of the body of his wife; she takes an estate-tail: for these estates are consolidated, and the heir of the wife does not take by purchase. *Dub.* 2 *Ver.* 489.

So, if a devise be to an heir of the same estate which he would have by descent; he shall take by descent. *Vide Devise* (K).

So, if a devise be to *A.* for life, remainder to the heir of the devisor in fee; the heir takes by descent, tho' it be a remainder: for it makes no alteration in the nature of his estate. *R.* 1 *Rol.* 626. *l.* 35.

So, if a devise be to *A.* till his heir attains the age of 24, and then to him in fee, and that his wife shall have a third part for her life; and if he dies before 24, to his wife for life; and if his heir has no issue, to his daughter in tail. 1 *Rol.* 626. *l.* 45.

So, if a copyhold be surrendered to the use of his will, and then he devises to *A.* for life, and afterwards to the heir of his body for ever; the heir of *A.* takes a fee by descent. *R.* 1 *Rol.* 627. *l.* 5.

So, if a devise be to *A.*, his younger son in tail, and if he dies without heir, to his own right heirs; the eldest son takes by descent. *R.* 1 *Sal.* 233, 4.

(B) When, by Purchase.

BUT a man takes by purchase where the estate first vests in him; and he does not derive it from his ancestor. (*Vide Co. L.* 3. *b.* 1 *Co.* 95. *Shelly.*)

As, if land be limited to *A.* for life, remainder to the right heirs of *B.*, his right heir takes the remainder by purchase. 1 *Rol.* 627. *l.* 15. *R.* 3 *Leo.* 14.

So, if a feoffment be to *B.*, to the use of *A.* in tail, and afterwards to the right heirs of *B.* For it was a remainder, and not a reversion, tho' *B.* was the feoffee. *Semb. Co. L.* 22. *b.*

So, if a devise be to *A.* for life, and after his death to his next heir male

male and the heirs male of his body; his son takes the remainder by purchase. *R. 1 Co. 66. b.*

So, where a man takes by executory devise, he takes by purchase. *Vide Devise, (N 16, 17.)*

So, a devise to *A.* for the life of *B.*, and then to the heirs male of *B.* then living; the son of *B.* then living, being godson to the testator, shall take, for it is *designatio personae*. *R. per three J. in B. R. which was reversed in the Exchequer-Chamber, and afterwards affirmed in Parliament. Ray. 330. 2 Jon. 99. 1 Vent. 334.*

So, if a copyhold be surrendered to *A.* and his heirs, and *A.* dies before admittance, by which his heir is admitted; he takes by purchase, for there was nothing in *A.*, who was never admitted. *R. 1 Rol. 627. l. 30.*

So, if an estate be limited to *B. per auter vie*, remainder to *A.* for life, remainder to the right heirs of *B.*; if he dies before *A.*, the remainder is not vested in *B.* tho' he has a freehold: for if he dies before *A.* it shall never take effect. *Lit. 258.*

So, if it be limited to *A.* and *B.* for their joint lives, and afterwards to *C.* for life, remainder to the right heirs of *B.* *2 Rol. 418. l. 10.*

[The words, "*heirs, heirs male, or heirs of the body*," are not always words of limitation; they may be construed words of purchase, either in will or deed. *Doe v. Laming, M. 1 G. 3. 2 B. M. 1100.]*
Vide Devise, (N 24.)

(C) To whom a Descent shall be.

(C 1.) To the next in Blood.

IF a man dies seised in fee, the descent shall be to his eldest son.

If he has no son, to all his daughters in coparcenary.

If he has no issue, to his eldest brother. *Lit. S. 5.*

If he has no brother, to all his sisters.

If he has no issue, nor brother, nor sister; to his next collateral cousin of the whole blood. *Lit. S. 2.*

But land shall not descend to the next in blood, if there be any nearer *jure representationis*: as, if *B.* has issue *C.* and *D.*, and *C.* dies in the life of his uncle, and then the uncle dies; his estate shall descend to the son of *C.*, and not to *D.* tho' he is nearest in blood. *Co. L. 10. b. 3 Co. 41. a.*

So, all the posterity of *C.* shall inherit before *D.* or his issue. *Co. L. 10. b.*

So, by the Jewish law. *Seld. de Succ.*

So, land shall not descend to the father, or other lineal ancestor, tho' he be nearest in blood; but shall descend to the uncle, or other collateral cousin. *Lit. S. 3.*

And this is a maxim peculiar to the common law. *Lib. Rub. cited Co. L. 11, a cont. Acc. 1 Vent. 414, 415.*

Yet if land descends from a son to his uncle, after the death of the uncle without issue, it may descend from him to the father. *Lit. S. 3.*

So, likewise if an estate be granted to a son for life, remainder to the next of his blood; the remainder shall be to the father, and not to the uncle. *Co. L. 10. b.*

So,

So, if an estate be limited to *A.* for life, remainder to his next of blood in fee; *A.* has no issue, his brother has issue *B.* and *C.* and dies; and *B.* also has issue, and dies, and then the death of *A.* happens; the remainder vests in *C.*, for he is the nearest of blood to *A.*, tho' the issue of *B.* shall be his heir. *Co. L. 10. b.*

(C 2.) *Tho' he be posthumous.*] So, if a man dies seised of land, (his wife being *privement enseint*), and his land descends to his daughter, brother, uncle, &c. and afterwards a son is born, or other nearer heir; the after-born issue shall enter upon the daughter, brother, uncle, or other remoter heir. *Co. L. 11. b.*

So, if land descends to a daughter, and another daughter is afterwards born; she shall be parcener with her sister. *Co. L. 11. b.*

So, if *A.* has issue *B.* and *C.*, and *B.* dies, his wife *privement enseint* with a son, then *A.* suffers a recovery to him and the heirs of his body, and dies before execution, and *C.* enters; the son of *B.* born afterwards shall enter upon him: for *C.* takes by descent, and the execution relates to the recovery, which was in the life of *A.* *R. 1 Co. 98. 106. Shelly.*

So, if husband and wife seised in tail general, have issue a daughter; then the husband dies, his wife *privement enseint*, and the wife aliens, upon which the daughter enters by *st. 11 H. 7. 20.* A son afterwards born shall enter upon her: for, by the statute, the daughter was in *quasi* by descent. *3 Co. 61. b.*

So, if a condition be broken in the life of the feoffor, who dies before entry; and afterwards his daughter, as heir, enters; a son born afterwards shall enter upon her. *1 Co. 99. a.*

So, if a man, entitled to enter upon consent given to a ravisher, dies before entry. *1 Co. 99. a.*

Or, to enter by force of a remainder. *1 Co. 99. a.*

4 But if an estate vests in a daughter, brother, &c. by purchase, and not by descent; a nearer heir, born afterwards, shall not divest it: as, if a remainder be limited to the right heirs of *B.*, who dies, his wife *privement enseint*, and then the remainder happens. *9 H. 7. 25. a. 1 Co. 95. a. R. 1 Sal. 227. 2 Ver. 579. Skin. 430. R. cont. in Parl. 4 Mod. 282. 3 Lev. 408.*

So, if it vests upon a contingency. *Cro. Car. 412.*

So, if a brother, &c. by his entry be remitted. *R. 3 Leo. 2.*

Or, upon a forfeiture for a condition broken, consent to a ravisher, &c. *5 Ed. 4. 6. a. 1 Co. 95. a.*

So, if a daughter, &c. pays money, or performs a condition, whereby the estate is preserved. *R. 1 Co. 95. a. 99. a. R. Cro. Car. 87.*

And now by the *st. 10 & 11 W. 3. 16.* a son or daughter born after the death of the parent shall take in the same manner as if born in his lifetime, tho' no estate be limited to preserve contingent remainders, &c.

(C 3.) To the most worthy.

So, it is a rule, that a descent shall be to the most worthy in blood; and therefore, if a man seised of land has issue several sons and daughters; the male issue shall be preferred, for the male is the most worthy. *Vide Co. L. 14.*

If

If there are several sons; the descent, by the common law, shall be to the eldest.

If there be not any issue, but a man has several brothers; the descent shall be to the eldest brother. *Lit. S. 5.*

So, if a man purchases land, and dies; all of the blood of the part of his father shall inherit before those of the blood of the part of his mother: for the blood of his father is the most worthy. *Lit. S. 4.*

And the father has also two bloods in him; the blood of his father, and of his mother. *Co. L. 12. a.*

And all of the blood of the father of the part of his father, shall inherit first; and then those of the blood of the father of the part of his mother. *Co. L. 12. b.*

So, if the same person has title by two bloods, and he cannot take by the most worthy, he shall not take by the other, but the land shall escheat: as, if *A.* attainted has issue *B.* and *C.*, and the eldest purchases, and dies; if *C.* should take by mediate and not by immediate descent, tho' he has the blood of *A.* and his wife, if he cannot take as heir to *A.*, he cannot as heir to the wife; tho' both bloods, viz. of the father and mother, were inheritable to *B.* *1 Vent. 426.*

(C 4.) To the whole Blood.

So, a descent shall be to the heir of the whole blood: and therefore, if a man has issue by divers venters, and the eldest purchases lands, and dies without issue; his half brother shall not inherit to him. *Lit. S. 6.*

So, none shall inherit an estate in fee-simple, if he has not in him the blood of the father and mother. *Co. L. 14. a.*

And therefore, if the eldest brother purchases and dies without issue, the descent shall be to his sister, uncle, or other next cousin of the whole blood, and not to the half brother. *Lit. S. 6, 7. 1 Vent. 424. Dy. 342. a.*

If a man pleads, that he is heir of the part of his mother, he ought to shew that he is heir of the whole blood. *1 Ver. 442.*

But if the eldest brother purchases, and dies without issue, and his uncle, &c. enters as heir, and dies; the half brother may inherit to him; for he is of his whole blood. *Lit. S. 8.*

[If lands descend to two daughters of the father by the first venter, and after his death an infant son be born of a second venter, the mother at that time residing in part of the premises, and receiving rent for the other parts, both before and after the birth of her son, though the son die within a short time, (as five weeks and three days,) this is a sufficient actual seisin in the infant son, to make a *possessio fratris*; so that the lands shall not descend from him to his sisters of the half blood, but to a more remote heir of the whole blood. *2 Bl. Rep. 938. 3 Wilf. 516.*]

(C 5.) An Heir ought to be of the Blood of the first Purchaser.

None can be heir to lands, who is not of the blood of the first purchaser. *Co. L. 12. a.*

And therefore, if a man inherits lands as heir to his father and dies without issue, it shall descend to his heir of the part of his father; and the heir of the part of his mother shall never take, for he is not

of the blood of the first purchaser : and if there is no heir of the part of his father, the land escheats. *Lit. S. 4.*

So, if he inherits as heir to his mother, it shall descend to the heir of the part of the mother : and if there be not any such, the land escheats. *Lit. S. 4.*

So, if *A.* purchases land and marries *B.* ; his issue, and all of the blood of *A.*, may inherit : but none of the blood of *B.* shall ever inherit. *Co. L. 12. a.*

So, if *B.* was the purchaser, none of the blood of *A.* could ever inherit. *Co. L. 12. a.*

(C 6.) When he takes as Heir of the Part of the Mother.

If a man has land as heir to his mother, and dies without alteration of his estate ; the heir of the part of his mother shall always take.

So, if he makes a feoffment to the use of himself and his heirs ; such use is in him as the antient use, and follows the nature of the land ; and therefore, the heir of the part of the mother shall inherit. *Co. L. 13. a. Dy. 134. 2 Rol. 780. l. 25.*

Tho' the use be expressly limited to him and his heirs ; as well as where it results to him by operation of law. *Cont. Dy. 134. a. Qu. 2 Rol. 780. l. 35. R. acc. 3 Lev. 406. Sal. 591. Eq. Ca. 186.*

Tho' a feoffment, fine, &c. be declared to the use of *A.* for life, and afterwards to the use of him and his heirs : for the fee is the antient use and reversion. *3 Lev. 406.*

Or, to the use of himself for life, or for 99 years, and afterwards to *A.* for life, and afterwards to him and his heirs. *R. 3 Lev. 406.*

Or, to the use of himself for life, then to his wife for life, then to the first, second, and other sons in tail, and afterwards to him and his heirs ; the reversion is the antient estate, and shall descend to the heir of the part of his mother. *R. in C. B. Tr. 7 An. inter Abbot and Burton, Sal. 591. (Com. 160.)*

Tho' there be a fine and recovery, by which the use arises out of the estate of the conusees : for they make but one conveyance. *R. Sal. 591. (Com. 160.)*

So, if a man seised as heir of the part of his mother, makes a feoffment upon condition, and afterwards enters for the condition broken ; the heir of the part of his mother shall take. *Vide Co. L. 12. b.*

So, if the feoffor dies, and his heir enter ; the heir of the part of the mother shall afterwards have the land. *Co. L. 12. b.*

If such a man makes a lease for life or years, or a gift in tail, rendering rent ; the reversion descends to the heir of the part of the mother, and the rent, as incident to the reversion. *Co. L. 12. b.*

So, if before the *st. Quia emptores terrarum* he had made a feoffment in fee of parcel of his manor, rendering rent. *Co. L. 12. b. 8 Co. 54. a.*

So, if he devises to *A.* for years, remainder to *B.* in fee, who was heir of the part of the mother ; he shall have it by descent. *R. 3 Lev. 127.*

So, if a man has a rent-fee as heir of the part of his mother, and the grantor grants a distress for rent, by which it becomes a rent-charge ; it shall go to the heir of the part of the mother. *Co. L. 13. a.*

So, if he has a manor, and a tenancy escheats. *Co. L. 13. a.*

If

If he recover upon voucher, the heir of the part of the mother shall have the land recovered. *Co. L. 13. a.*

[*A.* seised in fee devises to his wife in fee, and dies so seised, leaving *B.* his widow, and *C.* their only child, his heir at law. *B.* previous to her second marriage, by lease and release conveys to trustees to the use of herself for life, to trustees for a term, remainder to *C.* for life, to trustees to preserve, &c.; remainder to *C.* in tail, in default of issue to such person as *B.* by deed or will, notwithstanding coverture, shall appoint; for want of appointment, to her heirs for ever. *B.* by will duly executed, during coverture, devises all her real and personal estate, &c. subject and charged with payment of debts and legacies, to *C.*; *B.* dies, leaving *C.* her only child, and heir at law: he does not take from his mother by purchase, but by descent; and consequently, on his death, it descends to his heir *ex parte materna*. *R. per B. R.* unanimously, on a case out of Chancery; and decreed accordingly. *Hurst v. E. Winchelsea, M. 33 G. 2. 2 B. M. 880.*]

(C 7.) When not:

But if a man takes by purchase, the heir of the part of his father shall inherit, and not the heir of the part of his mother.

And therefore, if a man seised as heir of the part of his mother makes a feoffment, and takes back an estate to him and his heirs; the heir of the part of his father shall take: for it is a new purchase. *Co. L. 12. b.*

If he makes a feoffment, rendring rent to him and his heirs; the rent goes to the heir of the part of his father. *Co. L. 12. b.*

If husband and wife have issue *B.*, and land is given to *A.* for life, remainder to the heirs of the wife; *B.* takes as a purchaser: and therefore the land shall descend to the heir of the part of his father. *Co. L. 13. a.*

If husband and wife levy a fine of the land of the wife *sur grant & render* to them in tail, remainder to the heirs of the husband; the heir of the part of the husband shall take: for it is as a feoffment and re-feoffment. *R. 1 Sal. 337. Sho. 92. Carth. 140.*

If a man seised of the part of his mother levies a fine *sur grant & render* to himself, he shall be afterwards seised of the part of his father. *Mod. Ca. 45.*

[If *A.* has a lease to her and her heirs for three lives, and devises it to her daughter an infant, and directs the guardian to make purchases for the infant's benefit, the guardian on the death of a life takes a new lease for three new lives, and the infant dies; the new lease shall not go to the old uses, to the heirs *ex parte materna*, but to the heirs of the infant *ex parte paterna*. *Pierston v. Shore, T. 1739, 1 Atkyns, 480.*]

[If a tenant in tail of lands by purchase under a settlement made by an ancestor *ex parte materna*, with the reversion in fee by descent *ex parte materna*, suffer a common recovery to the use of himself and his heirs, the lands will descend to his heirs *ex parte paterna*. *Martyn v. Strachan, H. 16 Geo. 2. 2 Str. 1179. 1 Wilf. 2. 66. Willes, 444. Crow v. Baldwin, B. R. H. 33 Geo. 3. 5 T. R. 104.*]

[If tenant in tail by descent from the maternal ancestor suffer a recovery, and declare the uses to himself in fee, the estate will descend

to the heirs *ex parte materna*, whether the premises be copyhold or freehold. *Crow v. Baldwin, B. R. H. 33 Geo. 3. 5 T. R. 104.*]

[The different operation of a fine and recovery. *Ibid.*]

[If the legal estate in land descends in fee-simple *ex parte materna*, and the equitable interest in fee-simple *ex parte paterna*, or *vice versa*, the equitable estate shall merge in the legal, and both follow the line through which the legal estate descended. *Goodright v. Wills, B. R. T. 21 Geo. 3. Dougl. 771.*]

[One seised in fee of a copyhold of inheritance by descent *ex parte maternâ*, surrendered the same to the use of himself for life; remainder to such persons and for such estates as he should by deed or will attested by three witnesses appoint; remainder in default of appointment to himself in fee; after which he made a mortgage, and surrendered to the use of the mortgagee in fee, who, upon re-payment of principal and interest, surrendered again to the mortgagor: it was holden that the line of descent was thereby broken, and that the estate descended to the paternal heir. *Harman v. Morgan, B. R. H. 37 Geo. 3. 7 T. R. 103.*]

(C 8.) Must be Heir to him who was last seised.

A man, who takes by descent, ought to be heir to him who was last seised of the actual freehold and inheritance. *Co. L. 11. b. 15. a.*

And therefore, if a man dies without issue, and his uncle as his heir enters, and dies; the father may be heir to the uncle, his brother, who was last seised: but, if the uncle was not seised, the father cannot be heir. *Co. L. 11. b.*

So, if *A.* dies having a son and a daughter by one venter, and a son by another, and the son by the first venter becomes actually seised, and dies; his sister shall be heir to him: but if he be not seised, the son by the second venter shall be heir to his father. *Co. L. 15. R. Jon. 361.*

And in the last case, the descent is immediate from the father to the son by the second venter. *R. Jon. 361.*

[If lands are settled to the use of *A.* and *B.* and the survivor for life, then to the heirs of the body of *B.* by *A.*, and for want of such issue to *A.*, his heirs and assigns; and they have issue only a daughter *C.*, *B.* dies, *A.* marries again, and has issue only a daughter *D.*, *C.* marries, *A.* gives possession of the premises, but without conveyance, *A.* dies, then *C.* dies, leaving a son who dies; *A.* had no brother, only a sister, who enters; *D.* has no title to the lands. *Jenkins v. Prichard, H. 30 G. 2. 2 Wils. 45.*]

So, a man who claims an use, seigniority, rent, advowson, or other hereditament, ought to be heir to him who was last seised. *Co. L. 14. b.*

So, he who claims a copyhold. *Vide Copyhold, (D 1.)*

(C 9.) What shall be a Possession.

And therefore, where there was an actual seisin by an uncle, or brother, the father or sister may be heir: as, if the uncle or brother made an actual entry into the land. *Co. L. 11. b. 15. a.*

If he entred into a parcel, generally, it is sufficient for all the lands in the same county. *Co. L. 15. a.*

If the brother was within age, an entry by his guardian is sufficient.
Co. L. 15. a.

[*A.* died seised, leaving two infant daughters by different venters; it was holden, that an entry generally by the mother of the youngest daughter as her guardian in socage, constituted a sufficient seisin in the eldest infant daughter, to carry the descent of her moiety on her death to her heirs. *Doe v. Keen, B. R. M. 38 Geo. 3. 7 T. R. 386.*]

If the land was in lease for years, it is sufficient, tho' the brother did not enter, nor take the rent: for the possession of the lessee was his own possession. *Co. L. 15. a. 4 Co. 21. a. R. 1 Vent. 261.*

So, if it was a lease for life, and the brother received the rent after the death of his ancestor. *Semb. Co. L. 15. a.*

[The rule of *possessio fratris* does not apply to estates-tail, nor to inheritances in fee-simple without an actual possession of the brother of the whole blood. *Doe v. Whichelo, B. R. E. 39 Geo. 3. 8 T. R. 211.*]

[If tenant for life, with power to let leases, make a lease to *A.* for three lives, *habendum* from the day of the date; the lease is void, as being a freehold to commence *in futuro*, *A.* tenant at will, and his possession is the possession of the lessor. *Denn v. Fearnside, M. 21 G. 2. 1 Wils. 176.*]

So, if a father devised land *in capite* to his wife for life, and she entered into the whole; it shall be a possession of a third part for the heir, who was tenant in common with her for this third part. *R. Mo. 868.*

(C 10.) What not.

But if the uncle or brother had not actual seisin, the father or sister shall not be heir: and therefore, if the uncle or brother dies before entry by him, his guardian, or lessee, &c. the son by the second venter shall be heir. *Co. L. 15.*

So, if there be a lease for life, or a gift in tail, and he dies before receipt of rent. *Co. L. 15. a. R. 1 And. 31.*

So, if a descent be of a rent, and he dies before seisin of it. *Co. L. 15. b.*

Or, of an office, franchise, courts, common, &c. *Co. L. 15. b.*

So, if an advowson descends, and he dies before presentation. *Co. L. 15. b.*

So, if a dignity descends: for there cannot be a seisin of it. *Co. L. 15. b. R. Cro. Car. 601.*

So, if the crown, or the demesne lands of the crown, descend. *Co. L. 15. b.*

So, if an estate-tail descends: for it goes *secundum formam doni*. *Co. L. 14. b. 15. b.*

So, if the uncle, or brother be seised, but his seisin be defeated: as, if the wife of his ancestor recover dower, and survive him. *Co. L. 15. b.*

What advantages an heir shall have, *vide in Chancery, (3 P 2, 3.)*

(C 11.) Who cannot be an Heir.

(C 11.) *A monster.*] But a monster, which has not human form, cannot take by descent, as heir. *Co. L. 7. b.*

(C 12.) *A bastard, alien, &c.*] So, a bastard cannot take by descent. *Co. L. 8. a. Vide Bastard (E—F).*

Nor, an alien. *Vide alien, (C 1.)*

(C 13.) *A person attainted.*] So, a person attainted for treason or felony cannot be heir to any one. *Co. L. 8. a. St. P. C. 195. b.*

So, none can be heir to a man attainted for treason or felony: for his blood is corrupted. *Co. L. 8. a. St. P. C. 195. b.*

So, if a person attainted be pardoned by the king; a son, born after the attainder and before the pardon, cannot be heir to him, (*Vide St. P. C. 195. b.*)

Nor, a son born before the attainder: for his blood, corrupted by the attainder, is not restored by the charter of pardon. *Co. L. 8. a.*

So, if a son born before the attainder survives his father, a younger son, born after the charter of pardon, cannot inherit, tho' his blood is not corrupted: for his elder brother is living, though not inheritable. *Co. L. 8. a. Vide 1 Vent. 413. 417.*

If a man, after an attainder has two sons, and one of them purchases, and dies without issue, the other cannot be heir to his brother. *Co. L. 8. a.*

So, if a man attainted has a son, who purchases, and dies without issue; his uncle, &c. cannot inherit: for he ought to derive his blood by the mediation of the father, who was attainted. *1 Vent. 425.*

And when the blood of the heir is corrupted, which hinders a descent to him, the land escheats. *1 Vent. 426.*

But if a man be attainted, and afterwards has a charter of pardon, a son, born after the pardon, may inherit. *Co. L. 8. a.*

So, if a man attainted has two sons, one born before the attainder, and the other after a pardon, and the elder dies in the lifetime of his father, the younger may inherit. *Co. L. 8. a.*

So, if a man before attainder has two sons, and one purchases, and dies; the other may be heir to his brother. *Co. L. 8. a. 1 Vent. 425. Dub. Mod. 569.*

So, if the grandfather be attainted, and the son purchases, and dies without issue; his uncle may inherit: for the attainder was paramount to him. *1 Vent. 425.*

So, if there be a pardon by act of parliament, a son born before may inherit: for the corruption of the blood is purged. *Vide Co. L. 8. a.*

So, if the blood of the son be restored by act of parliament, the collateral heirs of the father may inherit him. *R. 1 Vent. 420.*

(C 14.) *A father to a son.*] So, inheritances cannot lineally ascend: and therefore a father cannot be heir to his son. *Co. L. 10. b. Vide Lit. S. 3. Vide ante, (C 1.)*

And that was the feudal law. *Mad. 125.*

But not the law of the *Jews*, or *Greeks*. *Per Hale, 1 Vent. 414.*

Nor, of the twelve tables. *Per Hale, 1 Vent. 414. Cont. Co. L. 11. a.*

Descents are either lineal or collateral: and both, either mediate, or immediate. *1 Vent. 415.*

The

The immediate lineal descent is from the father to his son; the collateral, from one brother to another. 1 Vent. 415. 423.

The mediate, when one derives his inheritable blood to another by the *medium* of a third person; as, in lineal descent, if a son claims as heir to his grandfather or great-grandfather, it shall be *mediante patre*, tho' the father be dead at the time of the descent. 1 Vent. 415.

So, in a collateral descent from a nephew to an uncle, or *à contra*, it shall be made *mediante patre*. 1 Vent. 415.

When a descent shall be *secundum formam doni*, vide *Estates*, (B 7, 8.)

Where it ought to be derived wholly through males, or through females, vide *Estates*, (B 9.)

(D) A Descent, which takes away Entry.

(D 1.) What shall be.

BY the common law, if a man seised of an estate of inheritance in lands or tenements dies seised, and the same lands and tenements descend from him to his heir; the entry of him, who had right, is hereby taken away. Co. L. 237.

And the entry shall be taken away where a man dies seised in tail, as well as in fee. Lit. S. 385, 386.

If he comes to the land by disseisin, abatement, or intrusion; or by the feoffment, gift, &c. of a disseisor, &c. Co. L. 237. b.

If he in reversion or remainder disseises the tenant for life, and dies seised. Co. L. 239. a.

If he in reversion or remainder, expectant upon a term for years, or an estate of tenant by statute or *elegit*, dies seised: for he is seised of the fee and freehold. Co. L. 239. b.

And a descent tolls the entry of all corporeal tenements, which lie in livery. Co. L. 237. b.

So, if he who dies seised, had but a seisin in law; as, if a disseisor of an infant die, seised, and then the infant attains his full age, and afterwards the heir of the disseisor, before his actual entry, dies. Co. L. 239. b.

If the descent be to an heir lineal, or collateral. Lit. S. 389.

(D 2.) What not.

(D 2.) *If he does not die seised of the inheritance, and freehold also.* But a descent does not take away an entry, if he who died seised had only an estate of freehold. Lit. S. 38.

As, if tenant for life, or *pur autre vie* of the disseisor, dies seised.

If a disseisor leases to B. and his heirs for the life of A., and B. dies seised, and his heir enters: for he takes only as a special occupant. Co. L. 239. a.

If a man disseises the tenant for life of the king; for he gains nothing but an estate for the life of the lessee. Co. L. 239. a.

So, a descent does not toll an entry, where a man dies seised only of a reversion, or remainder. Lit. S. 388.

So, if a disseisor leases for his own life, and dies; tho' the fee and freehold descend to his heir, yet he died seised only of the reversion. Co. L. 239. b.

(D 3.) *If he dies seised of things in grant.*] So, a descent of tenements which lie in grant does not take away the entry; as, of an advowson, rent, or common in gross, &c. *Co. L. 237. b.*

Nor, a descent of a copyhold, *vide Copyhold (E).*

(D 4.) *If there be not a dying seised.*] So, a descent does not toll entry, if a man does not die seised: as, if a disseisor, or his heir, or feoffee, enters into religion, and is professed; tho' it be a civil death, *Lit. S. 410.*

So, if he does not die seised of the same estate, which the heir has by descent: as, if donee in tail of a disseisor discontinues, and afterwards disseises the discontinnee, and dies seised; for the issue in tail is in his remitter, and is not in of the estate in fee of which his father died seised. *Co. L. 238. b.*

(D 5.) *If no descent, or the descent avoided.*] So, an entry shall not be tolled, if there be no descent; as, if land escheats upon the death of a disseisor or feoffee without issue. *Lit. S. 390.*

So, if the head of a corporation aggregate dies; that does not toll entry.

So, if a corporation sole, as a bishop, dean, &c. dies seised, and the land goes to his successor; that does not toll the entry, tho' there be twenty successions. *Lit. S. 413.*

So, if a descent be defeated: as, if an heir, after a descent, enters, and endows his mother: for as to this third part the descent is avoided. *Lit. S. 393.*

If a disseisor, or his heir, afterwards enters for a condition broken. *Lit. S. 409.*

So, if the disseisor himself, after a descent comes to the same land by descent or purchase, of an estate of freehold, the right of entry is revived: as, if a disseisor enfeoffs his father, who afterwards dies seised, and the land descends to the disseisor, as his heir. *Lit. S. 395.*

So, if he enfeoffs his grandfather, and the land descends to his father, and afterwards to the disseisor. *Co. L. 238. b.*

So, if the father, after the descent, leases to the disseisor for life. *Co. L. 238. b.*

So, if after a descent, the issue in tail dies without issue, whereby the estate-tail is determined; the disseisee may enter upon him in reversion or remainder. *Co. L. 238. b.*

So, if the descent be not immediate: as, if a woman disseisores takes husband, has issue, and dies, and the husband is tenant by the curtesy, and dies; the descent to the issue does not toll the entry. *Lit. S. 394. R. 1 Sal. 241.*

If a disseisor dies seised, his wife *privement enseint*; the descent to the son after-born does not take away the entry. *Co. L. 241. b.*

(D 6.) *If the descent be in time of war.*] So, entry shall not be tolled, where the disseisin and descent were in time of war. *Lit. S. 412.*

Or, if the disseisin was in time of peace, and the dying seised in time of war. *Co. L. 249. b.*

(D 7.) *Or, at the time of the descent, he who had the right was an infant.*] So, entry shall not be tolled, where he who had the right was an infant at the time of the descent. *Lit. S. 402.*

But, an infant shall be bound by a descent from the king. *Co. L. 246. a.*

So, if he had not a right of entry at the time of the descent: as, if a man dies, his wife *privement enseint*, and *B.* abates, and dies seised, and then a son is born; he shall be bound by the descent. *Co. L. 245. b.*

So, if donee in tail discontinues, and afterwards disseises the discontinuee, and dies seised; the heir of the discontinuee shall be bound, tho' an infant: for, by the descent to the heir of the disseisor, he was remitted. *Co. L. 246. a.*

(D 8.) *Feme-Covert.*] So, where a *feme-covert* is disseised by *A.* who dies seised during the coverture; her entry is not tolled after the death of her husband. *Lit. S. 403.*

So, if she was an infant when disseised, and marries; tho' the disseisin was before the coverture. *Co. L. 246. b.*

But, if a woman of full age be disseised, and afterwards takes husband; a descent during the coverture tolls her entry: for it was her folly that she did not enter before marriage, and that she took a husband who did not enter. *Co. L. 246. a.*

So, if a *feme-covert* be disseised, and her husband dies, and before a descent she takes another husband. *R. 1 Sal. 241.*

So, a descent during the coverture bars the entry of the husband, where the wife, after his death, may enter. *Lit. S. 403.*

(D 9.) *Non-fane, &c.*] So, where a man was non-fane at the time of the descent, tho' his entry is tolled, because he cannot disfigure himself, yet the entry of his heir is not tolled. *Lit. S. 405.*

(D 10.) *Descent does not take away a title of entry.*] So, a descent does not toll a title of entry; for there is no remedy for it by action: as, if a feoffment be upon condition, and the condition is broken, and afterwards the feoffee dies seised, and there be a descent to his heir; the entry of the feoffor for the condition broken is not tolled. *Lit. S. 391.*

So, tho' there was a descent before the condition broken. *Co. L. 240. a.*

Tho' the feoffee was disseised, and the disseisor died seised, and the land descended to his heir. *Lit. S. 392.*

So, a descent does not toll a title to enter for an alienation in *mortmain*. *Co. L. 240. b.*

Or, causâ matrimonii prelocuti. *Co. L. 240. b.*

Nor, a title to enter, upon consent to a ravisher. *Co. L. 240. b.*

So, a descent does not toll the title of a devisee, who claims by the will of him who died seised. *Co. L. 240. b.*

So, if the younger son enters by abatement after the death of his father, and dies seised; the descent does not toll the entry of the elder son, who claims by the same title; for it shall be intended that the younger claimed as heir. *Lit. S. 396.*

Tho' the younger son be but of the half blood, *Co. L. 242. b.*

So,

So, if the younger son enters by intrusion. *Co. L. 243. a.*

Otherwise, if the younger son enters upon the elder, and disseises him. *Lit. S. 397.*

Or, enters without colour of title: as, if a gift be to husband and wife and the heirs of their bodies, who have issue a daughter, and the wife dies, and the husband takes another wife, has issue several sons, and the eldest son enters by abatement, and dies seised; the descent tolls the entry of the daughter; for she claims by a different title. *Co. L. 242. b.*

So, if the eldest son enters by abatement, where the land is of the nature of *Borough-Englsh.* *Co. L. 243. a.*

Or, if the younger son enters by abatement, where his father had made a lease for years: for the possession of the lessee is the possession of the eldest son. *Co. L. 243. a.*

If one parcener enters specially claiming the whole estate, it does not toll the entry of the other parcener. *Lit. S. 398.*

So, if there be a lessee for years, and the lessor be disseised, and the disseisor die seised; the descent does not toll the entry of the lessee, tho' the entry of the lessor be tolled: for the lessee had only a term. *Lit. S. 411.*

Nor, the entry of tenant by statute, or *elegit.* *Co. L. 249. a.*

So, by the *st. 32 H. 8. 33.* the dying seised and descent of a disseisor, not having a right, shall not take away the entry of him that hath right, unless the person so dying seised was in possession five years after the disseisin, without entry or claim of him that hath right.

Tho' the disseisin be not with force. *Co. L. 238. a.*

So, if a corporation sole be disseised; the entry of the successor is not taken away, if the disseisor was not in possession five years before the dying seised. *Co. L. 238. a.*

So, if lessee for life be disseised, and dies, and afterwards the disseisor dies seised within five years; the entry of him in reversion or remainder is not tolled, tho' the disseisin be not immediate to him. *Co. L. 238. a.*

But this *st.* does not extend to an abator, or intruder. *Co. L. 238. a.*

Nor, to a feoffee of a disseisor. *Co. L. 238. a.*

So, if lessee for life be disseised by *A.* who dies seised within five years, and afterwards the lessee dies without entry; he in reversion or remainder cannot enter: for he had no right at the time of the descent. *Semb. Co. L. 238. a.*

When a descent shall be avoided by continual claim, *vide Claim, (A 1, &c.)*

When a descent from a *bastard eigne* binds the *mulier puisne*, *vide Bastard (F).*

For more of title *Discent*, *vide Affets (A—B).*—*Parceners, (A 7.)*—*Remitter, (A 1, &c.—Roy, A 1, 2.)*

DISCHARGE.

Vide Parliament, (L 46.)—Pleader, (2 G 13. 16.—3 M 12, &c.)—Release.—Temps, (G 11, 12.)

DISCLAIMER.

(A) When a Man may take it.

IN a real action, the tenant may disclaim to have any estate in the lands demanded. *Vide Abatement*, (F 15.)—*Droit* (F).—*Vide Co. L.* 102.

(B) The Effect of a Disclaimer.

IF the lord disclaims, his feigniory is extinct, and the tenant shall hold of the lord *paramount* by the same services. *Lit. S.* 146.

If the tenant disclaims, the lord shall have a writ of right upon his disclaimer for recovery of the land. *Vide Droit* (F).

(C) When a Man cannot disclaim.

BUT he who cannot part with the whole estate in the land, cannot disclaim; as, tenant for life, or years.

Nor, a person seised solely *in autre droit*: as, an husband seised in right of his wife.

Or, an abbot, bishop, dean, archdeacon, prebendary, &c. seised in right of his convent, church, &c. *Vide Lit. S.* 146. *Co. L.* 102. *b.* 103. *a.*

Vide Abatement, (F 15.)—*Droit* (F).

DISCONTINUANCE.

(A) Discontinuance; by whom it may be made.

(A 1.) By a Corporation Sole.

AS to discontinuance in pleading, and process, *vide Amendment* (I).—*Courts*, (P 11.)—*Pleader*, (V 1.—W 1.)

A discontinuance of an estate in lands and tenements is, when by the alienation of tenant in tail, or any seised *in autre droit*, the issue, heir, successor, or reversioner cannot enter, but shall be put to his action. *Co. L.* 325.

As, by the common law, if a corporation sole, seised *in autre droit*, had aliened without the assent of the convent or chapter; this was a discontinuance, and his successor could not enter without action. *Co. L.* 325. *b.*

As, if an abbot, &c. seised in right of his house, had aliened in fee, in tail, or for life, without the assent of the convent: his successor could not enter without a writ of entry *sine assensu capituli*. *Lit. S.* 593.

Or, a bishop, without the assent of the dean and chapter. *Co. L.* 325. *b.* *Lit. S.* 651.

Or, a dean, who is sole seised of land in right of his deanery. *Lit. S.* 652.

Or, a master of an hospital, sole seised in right of his house, if he aliens without the assent of his brethren. *Lit. S.* 657.

But

But if an abbot, bishop, &c. had aliened by the common law with the assent of the convent, dean, and chapter, &c. it was not a discontinuance. *Co. L. 325. b.*

So, if a corporation aggregate, as dean and chapter, mayor and commonalty, master and fellows, &c. had aliened; it was not a discontinuance: for the alienation by the whole corporation was lawful; by the head only was a disseisin. *Co. L. 325. b. Lit. S. 652. 654. 656.*

So, since *fl. 1 El. 19.* if a bishop makes a lease not warranted by the statute; it is not a discontinuance; for the lease is void. *1 Rol. 633. l. 30.*

So, if a parson had aliened, &c. without the assent of the patron and ordinary; his successor might have entred. *Lit. S. 643.*

Or, a vicar. *Lit. S. 644.*

So, a release, or confirmation, with warranty, by an abbot, bishop, &c. did not make a discontinuance: for his warranty expired by his death, privation, &c. *Lit. S. 604.*

Nor, a grant of a reversion, rent common, or thing which lies in grant. *Lit. S. 627, 628.*

But now, by the *fl. 1 El. 19. 13 El. 10. and 1 J. 3.* bishops and all other ecclesiastical persons are disabled to alien or discontinue any of their ecclesiastical livings. *Co. L. 325. b.*

(A 2.) *How relieved.*] The remedy for the successor upon a discontinuance, shall be by a writ of entry *sine assensu capituli.* *F. N. B. 194. l.*

And it lies in the *per, cui, and post.* *F. N. B. 194.*

(A 3.) By an Husband seised in Right of his Wife.

So, by the common law, if an husband seised in right of his wife had aliened in fee, tail, or for life; this made a discontinuance to the wife and her heirs, who could not enter after the death of her husband, but were put to their action, by a writ of *cui in vita*, or *sur cui in vita.* *Lit. S. 594.*

So, if husband and wife had joined in a lease for life, by deed, rendering rent. *Co. L. 333. a.*

So, if husband and wife were jointly seised in fee, or in tail, and the husband alone had made a feoffment; it was a discontinuance to the heir of the wife. *R. 8 Co. 71. b. 1 Rol. 634. l. 10.*

But a release by an husband, with warranty, to a disseisor of land, of which he was seised in right of his wife, was not a discontinuance: for the warranty does not descend upon the wife, unless where she is heir to her husband. *Lit. S. 605.*

Nor, a bargain and sale by deed indented and inrolled. *Per Brown, Mo. 28.*

So, if a woman tenant in tail takes husband, who aliens in fee; it is not a discontinuance, for he was not seised of the estate-tail. *Semb. 1 Rol. 634. l. 15.*

And now, by the *fl. 32 H. 8. 28.* a feoffment or other act of the husband, of the inheritance or freehold of his wife, shall be no discontinuance, nor prejudice the entry of the wife, her heirs, or any claiming after her death. *Vide Baron and Feme (K).*

Yet,

Yet, it shall be a discontinuance till avoided by the entry of the wife; and if the wife before entry levies a fine, that affirms the estate of the feoffee. *R. per three J. 2 Rol. 312.*

(A 4.) By Tenant in Tail.

(A 4.) *Alienation of what tenant makes a discontinuance.*] So, now, if tenant in tail, by feoffment, &c. aliens in fee, in tail, or for the life of another, and dies; his issue, or, if he dies without issue, he in reversion or remainder cannot enter, but is put to his *formedon*. *Lit. S. 595, 6, 7.*

So, if husband and wife seised to them and the heirs of their two bodies, and the husband alone makes a feoffment, &c. and dies after his wife: for the issue claims as heir of both bodies. *Co. L. 326. b. Vide Baron and Feme, (I 2.)*

If tenant in tail leases for years, and afterwards makes a feoffment, and letter of attorney to make livery, who ousts the lessee, and makes livery; it will be a discontinuance. *R. Mo. 91. 281. 1 Rol. 634. l. 35. Vide post. (B).*

So, if tenant in tail, remainder to himself in fee, makes a feoffment; it shall be a discontinuance, tho' the fee was in him. *1 Rol. 633. l. 7. Cro. Car. 405, 6.*

So, if tenant in tail of lands held *in capite* by devise, before *primer seisin* sued, makes a feoffment; it shall be a discontinuance of two parts which pass by the devise: for the feoffment was good for them. *R. 2 And. 210.*

If tenant in tail makes a lease for life not warranted by the *fl.* 32 *H. 8. 28.* it will be a discontinuance. *1 Rol. 633. l. 35.*

So, if a gift be to husband and wife and the heirs of the body of the husband, who makes a feoffment; it will be a discontinuance; for he was seised of the tail. *1 Rol. 634. l. 20. Lut. 732.*

Or, if the husband and wife join in a feoffment or fine. *1 Rol. 634. l. 25.*

But a fine, or feoffment by tenant for life to another in fee, does not make a discontinuance; but is a forfeiture.

So, if there be tenant for life, remainder to *A.* in tail, who disfeises the tenant for life, and afterwards makes a feoffment; it is not a discontinuance: for he was not seised of the tail. *1 Rol. 634. l. 30. Vide post. (C 3.)*

(A 5.) *Of what, not. By st. 11 H. 7. 20. What estate shall be within the statute.*] But now, by the *st. 11 H. 7. 20.* if any woman, who hath an estate in dower, for life, or in tail jointly with her husband, or to herself only, or to her use, in lands, &c. of the inheritance or purchase of her husband, or given to them in tail, or for life, by any ancestor of the husband, or any seised to the use of him or his ancestor, shall sole, or with an after-taken husband, discontinue, alien, &c. such discontinuance, &c. shall be void.

And if the woman at the time of such discontinuance be sole, she shall be barred of all interest, &c. and he, to whom the title belongs after her decease, shall immediately enter and enjoy.

If such after-taken husband and wife join in a discontinuance, &c. he, to whom the title belongs after the decease, may enter and enjoy during the life of husband; but afterwards the woman may re-enter, &c.

And

And every estate made for a jointure of a wife is within this statute. *Semb. Dy. 148.*

If it be to a wife for life, or in tail.

Whether it be in use or possession. *Dy. 147. b. Mo. 28.*

So, if there be an estate to a wife of the purchase or gift of the husband or his ancestor, it shall be within the *st. 11 H. 7.* tho' it be not a jointure strictly within the *stat. 27 H. 8.*: as, if husband and wife hold by copy in fee, and the husband purchases the freehold of the copyhold to him and his wife in tail. *R. Cro. El. 24.*

Tho' the gift was by the ancestor of the husband, to them in tail, before the marriage; upon which they married. *Semb. 2 Cro. 175.*

So, if an ancestor of the husband enfeoffs *A.* upon condition that he shall give back to the husband and wife in tail; which is done accordingly. *Mo. 93.*

So, if the husband himself enfeoffs *A.* upon the same condition. *R. 3 Co. 50. b. Cro. El. 514.*

Tho' the estate made by the feoffee does not pursue all the circumstances of the condition. *Cro. El. 514.*

So, if an ancestor of the husband makes an estate to *A.* for 30 years, and afterwards to himself for life, and afterwards to the husband and wife in tail. *R. Dy. 148.*

Or, to *A.* for 30 years, and afterwards to three others for their lives, and then to the husband and wife. *Dy. 148. Bend. 40.*

So, if an husband purchases land, which is conveyed to him and his wife, &c. tho' he pays for the purchase out of the portion of his wife. *Mo. 250.*

If a man and woman, joint-tenants, intermarry, and afterwards convey their land to themselves in tail, &c. it shall be within the statute for the husband's moiety. *Mo. 715. 28, 9.*

So, an estate to a wife, by an husband or his ancestor, shall be within the statute, tho' it does not appear by the deed itself to be given in consideration of marriage: for it may be averred, and found by the jury. *R. Dy. 148. Bend. 40.*

So, tho' the deed be in consideration of marriage, and of so much money. *R. Mo. 93. R. 2 Cro. 474.*

So, tho' the deed be in consideration of money, and no mention of marriage: for it may be averred to be as well for the one as for the other, for they are not inconsistent. *R. Dy. 147, 8.*

So, if an husband conveys to *A.*, and afterwards there is a recovery against *A.* and a settlement to husband and wife in tail, &c. it shall be within the statute, for the whole makes but one conveyance. *Mo. 718.*

So, if an husband settles land to the wife for life, &c. and afterwards the husband and wife levy a fine, make a mortgage, and limit the remainder to the heirs of the body of the wife; it shall be within the *st. 11 H. 7.* tho' by a subsequent conveyance. *Semb. 2 Ver. 489.*

So, if a trust or equity of redemption be settled upon a wife and the heirs of her body, it shall be within the statute. *2 Ver. 489.*

(A 6.) *What not.*] But if land be given to husband and wife and their heirs in fee, and the wife survives, an alienation by her is not within the *st. 11 H. 7. 20.*: for an estate which may descend to a collateral heir, and is not a provision for the issues of the marriage,
was

was not intended within the statute. *Semb. Dy. 248. a. R. Cro. El. 524. Mo. 716.*

So, if it be to a wife in tail general, remainder to a stranger in fee. *R. 1 Leo. 261. Cro. El. 2.*

So, if the inheritance of the wife be settled by fine, &c. to the use of husband and wife in tail; this is not within the *st. 11 H. 7. 20. R. Bend. pl. 266. R. Cro. El. 524. Co. L. 366. a. R. Plo. 464.*

Tho' the husband paid the charge of the settlement. *Dal. 116.*

Tho' it be by fine *sur grant & render. R. Plo. 464.*

So, if the estate be settled by an ancestor of the wife, to the use of the husband and wife in tail, &c. *Dal. 116.*

Or, if he makes a feoffment to *A.* upon condition, that he shall give back an estate to the husband and wife in tail. *Mo. 93.*

Tho' *A.* be father or ancestor of the husband. *Plo. 464. b.*

So, if a settlement by an ancestor of the wife be, in consideration of marriage, and also of service done by the husband.

Or, in consideration of marriage and money paid by the husband. *R. 2 Cro. 624. Jon. 254. R. Cro. Car. 244. Jon. 13.*

Tho' the money be to the value of the land; for the marriage is the principal consideration. *R. 2 Cro. 624. Jon. 254.*

So, if husband and wife levy a fine of land of the wife, and the co-nusee grants a rent to them in tail, and the wife after the death of the husband aliens the rent. *R. Cro. El. 2.*

So, if a man and woman, joint-tenants, intermarry, and settle land to themselves in tail, &c. it is not within the statute for the moiety of the wife; tho' the joint-estate was by the gift of an ancestor of the husband. *R. Mo. 715.*

So, if a stranger, for service of the husband, conveys land to husband and wife (who was his cousin) upon their marriage, in tail, &c. *Dub. Mo. 683. But afterwards in the same case R. acc. for it was a recompence to the husband, and not a purchase by him within the intent of the statute. Yel. 101. 2 Cro. 174.*

So, if husband and wife exchange lands, it is not a purchase of the husband. *Dal. 116.*

(A 7.) *What alienation shall be within the statute.*] Every alienation which makes a discontinuance will be within the *st. 11 H. 7. 20.* be it by feoffment, fine, or common recovery, tho' husband and wife are vouchees or tenants in the recovery. *Mo. 716.*

By release or confirmation with warranty. *3 Co. 51. 59. a.*

So, by demise for three lives, tho' it be not with warranty: for the word *warranty*, in the statute, ought to be referred to releases and confirmations. *R. 3 Co. 50. b. Cro. El. 514. Mo. 455.*

So, if a woman accepts a fine *sur consance*, and thereby grants and renders to *A.* for 1000 years. *R. 3 Co. 51. b. R. Mo. 250. Cro. El. 514. 2 Leo. 168. 2 And. 57. Godb. 6.*

So, if a woman entitled to dower, before assignment, levies a fine, &c. of it. *2 Leo. 168.*

If a wife and second husband convey to *A.* and his heirs, to the use of him and his heirs for the life of the wife only: for the limitation for the life of the wife regards only the use. *Per three J. Cro. El. 131.*

But by *st. 11 H. 7. 20.* the said act shall not extend to any recovery,

very, discontinuance, &c. where the heir, next inheritable to such woman, or to whom the inheritance of the same lands belongs next after her death, be assenting thereto, so as such assent is of record or enrolled.

And therefore, if a wife and the issue in tail join in a fine, &c. it shall not be within the statute. 3 Co. 60. b.

So, if a woman tenant for life, and husband and wife in right of the wife in remainder in tail, join in a fine. Dub. Dy. 89. b.

So, if the issue alien by fine, recovery, &c. and afterwards the woman releases with warranty, to the alienee; it shall not be within the statute; for it is intended to complete the act of the issue. R. 3 Co. 60.

So, if the woman aliens to the issue himself in fee. Yel. 101.

So, if the husband himself, who made the jointure, and his wife, join in a fine, &c. it is not within the statute. Cont. Co. L. 365. b. R. acc. 2 Cro. 475.

So, if a woman leases for 21 years, it is not an alienation within the statute, tho' not warranted by the *stat.* 32 H. 8. for it is an usual term. Jon. 60.

(A 8.) *Who shall take advantage.*] If a woman tenant in tail, by the gift of her husband or his ancestor, discontinues contrary to the *stat.* 11 H. 7. 20. his issue inheritable to the entail shall take advantage of the forfeiture by this statute.

If a gift be to husband and wife in tail, remainder to the husband in fee, who has issue, and dies, and the wife makes a discontinuance, and the issue had granted his remainder in fee to A.; yet the issue, and not A., shall enter for the forfeiture. R. 3 Co. 51. a. Mo. 455.

If the issue, who has a remainder expectant in fee, aliens by fine to A., then A. shall enter: for by the fine, his interest in the entail is barred and extinct. R. 3 Co. 51. Cro. El. 514. Mo. 455.

If the issue releases to a disseisor of the wife, to whom the wife afterwards releases with warranty, (which makes a discontinuance,) tho' the issue cannot enter against his release, yet his issue shall enter. 3 Co. 59. a.

Yet when he who had the interest at the time of the forfeiture, is disabled to take advantage of it, by fine or recovery; his issue, &c. shall never take advantage of it. R. 3 Co. 61. a.

So, if there be a daughter at the time of the forfeiture, and a son is born afterwards; he shall take advantage of the forfeiture, tho' the daughter had disabled herself by fine, recovery, or other act. 3 Co. 61. b.

So, if the daughter had joined with the wife in the fine, &c. by which she discontinued. 3 Co. 61. b.

So, if the daughter enter for the forfeiture, the son afterwards born shall enter upon her. 3 Co. 61. b.

So, the next in remainder or reversion, if there be no issue, shall take advantage of the forfeiture.

If a woman, tenant for life, joins with a remainder-man for life, in a feoffment, the subsequent remainder-man shall enter. 1 Leo. 262.

But a fine, recovery, feoffment, &c. which makes a discontinuance, shall be void only as against him who has the interest, &c. to enter. R. 3 Co. 59. b. D. Hob. 166.

And when he enters, he shall be in *paramount* his former estate and shall

shall not be in ward, tho' within age. *R. Dy. 362. 3 Co. 62. a.* Yet he shall take in right of the entail, and *quasi* by descent. *Hob. 337.*

And shall have only for the life of the husband; tho' husband and wife discontinue by fine. *Dub. Dy. 362. a. Acc. 3 Co. 62. a.*

So, if a woman with her second husband aliens to the issue, who by fine conveys to *B.*, and after the death of her husband the woman enters and avoids her alienation, and then discontinues; *B.* shall not take advantage: for a new right did not accrue after the fine. *R. Vel. 101. 2 Cro. 175.*

(B) What Alienation makes a Discontinuance.

A Discontinuance by tenant in tail may be made by five manners of conveyance; as, by fine, common recovery, feoffment, release, or confirmation with warranty. *Co. L. 325. a.*

And therefore, if tenant in tail levies a fine or suffers a common recovery with a single voucher; this makes a discontinuance of the estate-tail, and puts him in reversion or remainder to his action. *Vide Co. L. 325. a.*

[Whether it is a fine with proclamations, or a fine at common law without proclamations, it puts the reversioner or remainder-man to his *formedon*. *Doe v. Whitehead, H. 32 G. 2. 2 B. M. 704.*]

If he suffers a feigned recovery by default. *Co. L. 356. a. 361.*

If he levies a fine, or recovery in *antient demesne*. *R. Lut. 781.*

So, if he makes a feoffment: for in respect of the livery the estate is divested, and the whole fee passes; by which the issue, and by consequence he in reversion and remainder, are put to their action, and cannot enter. *Co. L. 327. b. Dy. 363. a.*

Tho' the feoffment be by *parol*. *Co. L. 330. b.*

So, if he makes a lease to *A.* for life, remainder to *B.* in fee: for the whole is one estate, and passes by the same livery. *Co. L. 333. b.*

Or, a lease for years, remainder in fee. *Lit. S. 631.*

So, if he leases for years, and afterwards makes a feoffment in fee. *R. Mo. 91. 281.*

Or, levies a fine. *Co. L. 332. b. Vide post. (C 3.)*

If he leases for life, and afterwards enters upon his lessee, and makes a feoffment, and the lessee re-enters. *Mo. 281.*

So, if lessee for life surrenders to him, or he recovers for waste, or enters for a forfeiture, and afterwards makes a feoffment, &c. *Co. L. 333. b.*

So, if tenant in tail makes a lease not warranted by *ss. 32 H. 8. 28.* for the life of another; it will be a discontinuance. *R. 1 Rol. 633. l. 10. 35. 2 Rol. 59. l. 1.*

So, if tenant in tail releases with warranty, which descends upon the issue; it shall be a discontinuance, for the safeguard of the warranty, which would be destroyed if the issue might enter. *Lit. S. 601. Co. L. 328. a. b.*

So, if tenant in tail leases for life, and afterwards grants the reversion in fee with warranty, which descends upon the issue with assets; it shall be a bar to him, tho' his right of entry was not taken away. *1 Sal. 245. R. Cro. Car. 156. Jen. 209.*

So, if tenant in tail be disseised, and releases to the disseisor, with warranty: for this is tantamount to a feoffment. *Mo. 256.*

So, if tenant in tail makes a discontinuance for life, &c. whereby he has a new reversion, and he afterwards grants his reversion in fee, which takes effect in his life; it shall be a discontinuance in fee: for it is a continuance of the first act, which was with livery. *Co. L. 333.*

1 Sal. 244.

Whether it takes effect by the death, surrender, or forfeiture of the discontinuance for life. *Co. L. 333. b.*

So, if he releases to the discontinuance for life, and his heirs: for it is executed immediately. *Co. L. 333. b.*

If he gives to *A.* in tail, and afterwards releases to him and his heirs; if *A.* dies without issue in the life of tenant in tail. *Co. L. 333. b.*

If he grants the reversion to the use of another in fee, and this takes effect in his life. *Co. L. 333. b.*

Or, bargains and sells by deed indented and inrolled. *Co. L. 333. b.*

Vide post. (C 5. 7.)

(C) What not.

(C 1.) If the Estate be not divested.

(C 1.) *As, by a release, &c. BUT* a conveyance which does not operate by transmutation of the estate or possession, generally, does not make a discontinuance: for it can only be where the estate is displaced and turned to a right. *Co. L. 327. b.*

And therefore, if tenant in tail conveys by lease and release to another in fee, in tail, or for life, it shall not be a discontinuance: for nothing passes but that which tenant in tail may lawfully do, viz. for his own life. *Lit. S. 606. Vide post. (C 4.)*

So, if he leases to another for his own life, or for years, and afterwards confirms the estate of the lessee, for life, or in tail, or fee. *Lit. 607. 609. 619.*

So, if tenant in tail releases to his disseisor, without warranty, all his right. *Lit. S. 598. 600.*

(C 2.) *Or, if the warranty does not descend upon the issue in tail.]* So, a release, &c. with warranty, shall not be a discontinuance, if the warranty does not descend upon the issue in tail: as, if a man has a son by a first wife, and land is given to him and a second wife and the heirs of their bodies; he is afterwards disseised, and releases to the disseisor, with warranty; this does not make a discontinuance; for the warranty shall descend to his son by the first venturer. *Lit. S. 602.*

Or, if the land be of the nature of *Borough-English*, and he has two sons: for the warranty descends upon the heir at the common law. *Lit. S. 603. Vide Garranty, (I 2.)*

(C 3.) *By a conveyance of that which lies in grant.]* So, a grant of tenant in tail does not make a discontinuance: as, if he grants in fee, &c. a reversion after a lease for life, or for years; for nothing passes except for the life of tenant in tail. *Lit. S. 608. 612. 619.*

Tho' the grant be inrolled. *Co. L. 330. b.*

And

And if the lessee attorns. *Co. L. 330. b.*

So, if tenant in tail grants all his estate. *Lit. S. 613.*

Tho' livery of seisin be made upon such grant. *Lit. S. 613.*

So, if tenant in tail in remainder grants his estate in fee, &c. *Lit. S. 615.*

Or, makes a feoffment of it, with the assent of the tenant for life : for his assent is not a surrender. *R. Carth. 110.*

So, if he disseises tenant for life, and afterwards makes a feoffment in fee : for he was not seised in tail. *1 Rol. 634. l. 30.*

So, if tenant in tail of any thing which lies solely in grant, makes a grant of it in fee, &c. it shall not be a discontinuance : as, if he grants a rent, common, advowson, &c. *Lit. S. 616, 617.*

So, if tenant in tail of a reversion, remainder, rent, common, or other thing which lies in grant, levies a fine of it in the king's court, it does not make a discontinuance : for nothing passes but for his own life. *Lit. S. 618. R. 2 And. 110.*

If the reversion be after a lease for his own life. *Co. L. 332. b.*

But if it be after a lease by him for years, it will be a discontinuance : for then the freehold passed by the fine, and all the estates are displaced. *Co. L. 332. b. Vide ante (B).*

So, if tenant in tail grants a thing, which lies in grant only, with warranty which descends upon the issue ; it shall not be a discontinuance. *Co. L. 332. b.*

Tho' he leaves assets in fee. *Co. L. 332. b.*

So, if tenant in tail of a rent disseises the terre-tenant, and makes a feoffment with warranty ; it shall not be a discontinuance of the rent, tho' the warranty extends to it. *Co. L. 332. b.*

But a grant of a reversion by tenant in tail, after a former discontinuance for life, &c. if it takes effect in his life, enlarges and continues the first discontinuance. *Co. L. 333. Vide ante (B).*

(C 4.) *By a conveyance which has not livery.* So, a conveyance of lands and tenements which operates by the execution of the deed, without other ceremony, shall not be a discontinuance : as, if tenant in tail exchanges land : for it passes by the deed, without livery. *Co. L. 332. b.*

So, if a man tenant in tail devises his land by his will, it does not make a discontinuance : for it does not take effect in his lifetime. *Lit. S. 624.*

If he conveys by lease and release without warranty. *Vide ante, (C 1.)*

Or, by bargain and sale inrolled. *Adm. 1 And. 113. R. 3 Leo. 16.*

So, if tenant in tail covenants to stand seised to the use of another in fee. *1 Leo. 110.*

So, if tenant in tail in remainder, or such a person as could not make a discontinuance by feoffment, releases to a disseisee, with warranty. *R. Mo. 256.*

Or, levies a fine, and dies without issue in the life of tenant for life. *R. 2 And. 110. R. Latch, 65.*

So, if the king tenant in tail grants lands by his letters patent ; it does not make a discontinuance. *Co. L. 332. b.*

If a copyholder tenant in tail surrenders in fee, &c. it does not make a discontinuance. *1 Rol. 632. l. 25. Vide Copyhold (E).*

So, if an husband seised in right of his wife, of a copyhold, surrenders in fee. *R. 4 Co. 23. a. 1 Rol. 632. l. 35. Vide Copyhold (E).*

(C 5.) To him in reversion or remainder, or with him.] So, if tenant in tail conveys to him, who has the immediate remainder or reversion dependent upon the estate-tail; it does not make a discontinuance. *Lit. S. 625, 626. 1 Rol. 633. l. 45.*

So, if tenant for life, and he in the remainder in tail, join in a fine; it shall not be a discontinuance: for each gives that which he lawfully may. *R. 1 Co. 76. R. Cro. El. 827. Mo. 634. Ow. 130.*

So, if a reversion or remainder be in the king, and tenant in tail makes a feoffment, &c. it shall not be a discontinuance: for the reversion in the king cannot be divested; and without divesting all estates, there can be no discontinuance. *Co. L. 335. a.*

So, if there be tenant for life, remainder to his wife for life, remainder to the heirs of their bodies, remainder to A. in fee, and husband and wife levy a fine to B. in fee; this is not a discontinuance to the estate of A., which was not divested by the fine: for the estate-tail was not executed in the tenant for life. *R. per three J. 1 Lev. 37.*

So, if there be tenant for life, remainder to B. in tail, and they make a lease for three lives; for it is the lease of the tenant for life, and the confirmation of B. *R. Cro. El. 56.*

Tenant for life, remainder to the heir of B. in tail, remainder to C. in tail; if the tenant for life and C. in the life of B. levy a fine, it will not be a discontinuance: for by fine or feoffment before the contingency, the contingent remainder is prevented. *2 Sand. 386.*

But if tenant in tail conveys to him in reversion and a stranger, it shall be a discontinuance of the whole. *Co. L. 335. a.—If he who is the stranger survives, otherwise not. Cro. Car. 406.*

Or, to him in reversion, when there is a mesne remainder in tail, or for life. *Co. L. 335. a. 1 Rol. 634. l. 2.*

So, if tenant in tail, remainder to B. in tail, remainder to C. in tail, &c. joins with C. in a feoffment and fine; it will be a discontinuance: for there is a mesne remainder in B. *R. Cro. Car. 321. Jon. 324. 1 Rol. 632. l. 50.*

So, if tenant in tail and he in reversion join in a lease not warranted by *β. 32 H. 8. 28.* it shall be a discontinuance, tho' the tenant in tail dies without issue before the lease determines. *R. per three J. Croke cont. Cro. Car. 387. 405. 1 Rol. 633. l. 10. Jon. 359. Hut. 126.*

(C 6.) If the Discontinuor be an Infant.

So, if tenant in tail within age makes a feoffment, &c. it shall not be a discontinuance: for he may avoid it by his entry; and that which he himself shall avoid shall not hurt others; and therefore, if he dies, the issue in tail may enter. *Lit. S. 633. 635.*

So, if joint-tenants within age make a feoffment, the survivor shall enter into the whole. *Lit. S. 634.*

(C 7.) Or, was never seised by Force of the Entail.

So, there shall not be a discontinuance by him who was never seised by force of the entail: as, if the grandfather be disseised by the father, who makes a feoffment, and dies; the feoffment never shall be

be a discontinuance, because the feoffor was not seised of the entail.
Lit. S. 637.

Tho' the father survives the grandfather; for tho' he himself cannot enter against his own feoffment, his issue may. *Co. L. 339. a.*

So, if tenant in tail discontinues for life, and dies, his issue grants the reversion in fee, which takes effect in his lifetime; this shall not be a discontinuance; for he was not before seised by force of the entail. *Lit. S. 638.*

Tho' the grant of the reversion was, with warranty. *Co. L. 339. b.*

So, if the issue inheritable to an entail makes a feoffment in the life of his ancestor, it shall not be a discontinuance. *Lit. S. 640, 641.*

If he in remainder in tail after an estate for life, disseises the tenant for life, and makes a feoffment; *Lit. S. 658.* for tho' the remainder was vested in him, yet he was not seised in tail. *Co. L. 347. b.* [*Vide Cowp. 702.*]

If tenant for life, remainder to *B.* in tail, join in a fine to *C.* in fee. *R. Cro. El. 827, 8.*

If a woman, tenant for life, intermarries with him in remainder in tail, and husband and wife join in a fine. *R. Mo. 634. Cro. El. 827.*

So, if the eldest son inheritable by the entail enfeoffs *A.*, against whom a recovery is had, in which the feoffor was vouched, and then dies, in the life of tenant in tail, without issue; it shall not be a discontinuance to the younger son. *R. 1 And. 44.*

But there is no need that the person be seised by force of the entail at the time of the discontinuance, if he ever was seised by force of it. *Co. El. 339.*

So, a feoffment with warranty by issue inheritable to the entail, tho' he was never seised of it, may have the effect of a discontinuance. *Co. L. 339. a.*

So, a fine by him in remainder in tail after a term for years, during the term, shall be a discontinuance, tho' he is not tenant in tail in possession. *Per Coke, 1 Rol. 188.*

So, if there be tenant in tail after an estate to *A.* for life, and *A.* makes a feoffment to the use of himself for life, remainder to the tenant in tail in fee, and afterwards *A.* and the tenant in tail enter, and make livery to *B.*, it will be a discontinuance: for by the entry of the tenant in tail, (which shall be adjudged an entry for the forfeiture,) he was seised in tail, and then a feoffment by him and *A.* to *B.* made a discontinuance. *Per two J. Clench. cont. 1 Leo. 127. Cro. El. 135.*

So, if an estate be given to husband and wife and the heirs of the body of the husband, and they join in a feoffment and fine; it will be a discontinuance: tho' the wife had a joint estate for life with the husband, and therefore he had not an absolute seisin of the estate-tail. *R. per three J. Jones cont. Cro. Car. 321. Jon. 323. 1 Rol. 632. l. 47.*

(C 8.) If the Discontinuance was not executed in his Lifetime.

So, if the act, by which the discontinuance is made, does not take effect in the life of the tenant in tail, there shall be no discontinuance.

As, if a fine be levied by which the tenant in tail grants and renders his land to *B.* in fee; it shall not be a discontinuance if the

tenant in tail dies before execution. *Co. L. 333. b. 1 Rol. 631. l. 45.*

So, if tenant in tail discontinues for life or in tail, and afterwards grants the reversion in fee; the grant does not make or enlarge the former discontinuance, if it does not take effect in his lifetime. *Lit. S. 622.*

Tho' the grant be with warranty. *Co. L. 333. b.*

So, if he discontinues for life by fine with warranty, and afterwards levies another fine with warranty to himself and his heirs; the last fine did not make another discontinuance: for the use being to himself, the warranty was extinct. *R. 1 Sal. 244.*

So, if the last fine was to *A.* and his heirs, it would not be a discontinuance, if the first discontinuee for life did not die before the tenant in tail. *R. 1 Sal. 244.*

If *A.*, tenant in tail, enfeoffs *B.*, who re-enfeoffs *A.*, *C.*, and *D.*, to the use of *A.* for life, remainder to his son in fee, and a recovery is had against *A.* who dies, and *C.* and *D.* enter; the discontinuance ceases with the life of *A.* *R. 1 And. 44.*

So, if the grantee of a reversion grants it to *B.*, and then the discontinuee for life dies in the lifetime of the tenant in tail, and *B.* enters; it shall not be a discontinuance, because *B.* does not take by the grant of tenant in tail himself. *Co. L. 333. b.*

Or, if the grantee dies without heir, by which the reversion escheats, and then the discontinuee for life dies, and the lord enters. *Lit. S. 642.*

So, if it be not executed by lawful means; as, if tenant in tail disseises a discontinuee for life, and makes a feoffment, and then the discontinuee dies, in his lifetime; the feoffment shall not be a discontinuance. *Co. L. 333. b.*

(C 9.) If his Act was lawful,

So, a common recovery by tenant in tail, as vouchee, is not a discontinuance, but a bar to the entail, and all remainders and the reversion. *Vide Estates, (B 27, &c.)*

So, a fine by tenant in tail is a bar to his issue, and a discontinuance only to those in remainder or reversion. *Vide Estates, (B 25.)*

So now, by the *st. 32 H. 8. 28.* a lease for three lives pursuant to the same statute does not make a discontinuance. *Co. L. 333. a. Per two J. 1 Leo. 299. R. Cro. El. 602. Sav. 77. Per three J. 4 Leo. 191.*

So, if tenant in tail leases for 100 years or more; it does not make a discontinuance: for the lease determines by his death. *Lit. S. 622.*

So, partition made by parceners in tail does not make a discontinuance. *Lit. S. 602.*

So, if tenant for life or for years makes a feoffment, &c. it shall not be a discontinuance, but a *disseisin*. (*Qu. Forfeiture?*)

Yet a recovery against tenant for life, by default, upon a false title, makes a discontinuance to the reversion or remainder. *Lit. S. 674, 688.*

(D) The Effects of a Discontinuance.

EVERY discontinuance divests the estate-tail, and all remainders, and the reversion depending upon it. *Co. L. 327. b.*

But if husband and wife join in a lease for life of the land of the wife, rendering rent, the reversion was not out of the wife. *Co. L. 333. a.*

So, by a discontinuance for life or in tail, the tenant in tail gains a new and tortious reversion in fee to himself; for being divested out of the donor, &c. and not granted to the discontinuee, it remains in the discontinuor. *Lit. S. 620.*

And this reversion descends to the heir general, not to the heir in tail. *Lit. S. 623.*

But if the discontinuance determines in the life of the tenant in tail; the tortious reversion vanishes, and he shall be tenant in tail as before. *Co. L. 333. a.*

(E) When it shall be determined.

IF the estate of the discontinuee determines, or is defeated; the discontinuance is purged: as, if a discontinuee for life dies, or in tail, dies without issue, in the life of the tenant in tail. *Vide Co. L. 333. a.*

If the discontinuance be for three lives, which die. *R. Lut. 781.*

So, if the estate of the discontinuee be forfeited or surrendered. *Lit. S. 636.*

Or, defeated by entry for a condition broken. *Lit. S. 632.*

If the discontinuee re-enseoffs the discontinuor. *3 Leo. 10.*

But if there be a discontinuance with warranty, and the discontinuee makes a lease, and afterwards conveys to the discontinuor, who dies; his heir shall not avoid the lease, tho' the warranty be determined by the re-conveyance. *3 Leo. 10.*

When a discontinuance shall be avoided by remitter, *vide in Remitter, (A 1.)*

DISCOVERY.

Vide Chancery, (2 G 3.—3 B 1, 2.—3 I 1.)

DISFRANCHISEMENT.

Vide Franchises, (F 33, 34.)

DISJUNCTIVE.

Vide Condition, (K 1, &c.)—Parols, (A 12.)—Pleader, (R 7.)

D I S M E S.

(A) Tithes; the Nature of them.

TITHES are an ecclesiastical inheritance, collateral to the land, and properly due to an ecclesiastical person. *D. 11 Co. 13. b.*

And because they are collateral they cannot be extinguished by unity of possession; as, if a parson, &c. be seised of lands in right of his church, if he afterwards aliens them, tithes are payable. *Mo. 50. Vide post, (D).*

If a manor or lands belonged to an abbot, prior, &c. to whom a church was appropriate; after the dissolution, the tithes of the lands copyholds of the manor should be paid to the parson. *R. Mo. 50. 219.*

So, they are not extinguished, if the parson releases to his parishioner all demands in his land. *Orw. 39, 40.*

So, they cannot be granted by copy: for they are not parcel of the demesnes of the manor. *Dub. Cro. El. 814. 293. R. contra, Cro. El. 413. Per Rol. 1 Rol. 498. l. 10. Mo. 355. Vide Copyhold, (C 1.)*

So, they are an incorporeal inheritance: and therefore do not pass by grant without deed.

And a rent cannot be issuing out of them. *Co. L. 47. a.*

(B) Other Ecclesiastical Revenue.

(B 1.) Oblations, &c.

OTHER ecclesiastical revenues were oblations, or obventions, pensions, and mortuaries. *Vide Prohibition, (G 11.)*

Oblations are, *quæcunque a piis offeruntur Deo & ecclesiæ. 2 Inst. 489.*

And they are voluntary, or due by custom at a certain time; as, upon marriage, baptism, purification of women, funerals, &c. *Vide 2 Inst. 659.*

And by *Can. S. Mepham. arch. Cant. made anno 1328*, those qui in nubentium solenniis, purificationibus, exequiis, &c. ad minus uenar. vel al. modica quantitat. oblationem populi devotionem sunt moliti restringere, &c. shall be subject to the pain of excommunication. *Vide Lind. 185. Vide Cod. Ju. Eccl. 739.*

And by *Can. Othoboni, anno 1268, capellani, &c. universas oblationes, &c. rectori ecclesiæ matricis restituere debent*, under pain of suspension, *Vide Co. Ju. Eccl. 235.*

And now, by *st. 2 & 3 Ed. 6. 13.* all who by the laws and custom of the realm ought to pay offerings, shall yearly pay them to the parson, &c. or farmer of the parish where he dwells, at the four most usual offering-days, or otherwise at *Easter*.

By this statute all customary oblations to be paid at communion, marriages, &c. ought to be paid.

[*Per tot. Cur.—Easter offerings are due of common right at 2 d. per head, unless customary to pay more, to him who exercises the spiritual function. Lawrence v. Jones, T. 10 G. Bunb. 173. Egerton v. Still, T. 1725, Bunb. 198. A mortuary cannot be sued for in equity, but at common law, or in the spiritual court. Torrent v. Burley, M. 13 G. Str. 715.]*

[A poor vicarage may be entitled to an augmentation under *stat. 29 C.*

29 C. c. 8. tho' the reservation is not made to it; and a constant regular payment is evidence thereof. *Benson v. Dean and Chapter of York, H. 1747, 1 Vesey, 91.*

As to tenths, first-fruits, synodals, procurations, &c. *vide Tenths. — Prohibition, (G 11.)*

(B 2.) Glebe.

Every church of common right ought to have a manse and glebe. *Vide Ecclesiastical Persons, (C 9.)*

Gleba, est terra in qua consistit dos ecclesie. Lind. 254.

By *Can. 1603. 87.* archbishops and bishops shall procure terriers of all glebe, &c. which belong to any parsonage, vicarage, or rural prebend, to be taken by honest men of every parish (of whom the minister to be one) to be laid up in their registers. *Vide Cod. Ju. Eccl. 688.*

(C) To whom due.

(C 1.) To the Rector.

ALL tithes, renewing within a parish, regularly ought to be paid to the rector of the same parish. *Hob. 296.*

And this since the council of *Lateran* A° 1215. *Seld. H. of T. 3 vol. 1150. 1222. 1258.*

If there be rector and vicar endowed, all tithes belong to the rector, which the vicar does not claim by endowment or prescription. *R. 2 Bul. 27.*

[A perpetual curate of a chapel, tho' appointed expressly for life, being removable at common law without cause, and by ecclesiastical law for cause, has not such a permanent interest as to claim tithes. *Price v. Pratt, M. 1729, Bunb. 273.*]

A rector by an illegal presentation, being inducted, shall have tithes. *Hob. 302.*

But before the council of *Lateran* A° 1215, every one might give his tithes to what spiritual person he pleased. *2 Inst. 641. 2 Co. 44. b.* But this was restrained, not by a canon of that council, but by a decretal epistle of pope *Innocent 3d. Cod. Ju. Eccl. 690. [Vide 2 Wilf. 182.]*

So, if cattle depasture in a fenn, &c. which is extraparochial, tithes of the pasturage are payable to the rector of the parish where the owner inhabits, if there be not a custom for payment to another. *Sav. 60.*

So, by *st. 2 & 3 Ed. 6. 13.* if it is not known in what parish the waste or common, where the cattle depasture, lies.

(C 2.) To another Spiritual Person.

But by custom, a portion of tithes in one parish, may be due to the rector of another parish. *4 Co. 35.*

So, if the vicar be endowed with tithes of hay, or small tithes, they ought to be paid to him.

If the vicar be endowed with tithes of hay, and the land be sowed with clover; the vicar shall have the tithes of the clover. *R. (ut dicitur) Carth. 264. Skin. 341.*

If

If a parson has tithes of all grain, he shall have the tithes of seed of clover, tho' the vicar has the tithes of the clover-grafs. *Skin.* 341.

But a parish-clerk cannot prescribe to have tithes. *R. Mo.* 908.

(C 3.) To the King.

Extraparochial tithes are due to the king. 1 *R.* 657. l. 15. 20. 30. 35. *Sti.* 137. *Cod. Ju. Eccl.* 691.

[The tithes of assart lands, by virtue of the words *de novo assartatis*, & *assartandis* in the grant of *Ed.* 1. should be confined to such lands as were then assarted, or intended shortly so to be; and not extended to such as should be so in future ages, especially if they had never paid tithes. *Semb. per Comyns. Bond v. Brown, H.* 1731, *Bunb.* 312.]

And if the king grants them, his patentee shall have them. 1 *Rol.* 657. l. 15. *Vide post.* (C 5.)

But, by custom, they may be paid to the parson, vicar, &c. of such a parish. *Sav.* 60.

So, now, by *st.* 2 & 3 *E.* 6. 13. the tithes of cattle depasturing in a waste or common extraparochial, or, if the parish is unknown, are given to the parson, &c. of the parish where the owner dwells. 2 *Inst.* 651.

(C 4.) To the Lord of the Manor.

By the common law no one was capable to take tithes in pernancy, but a spiritual person, or the king, who is *persona mixta*. *R.* 2 *Co.* 44. 45.

Or, the patentee of the king, by his prerogative. 2 *Co.* 44. a.

Yet by indirect means, a layman might take them; as, a lord of a manor may prescribe, in consideration that he has paid so much to the rector for all tithes within his manor, to take all tithes within his manor. *R.* 2 *Co.* 45. *Cro. El.* 599. *R. Cro. El.* 763. *Mo.* 485.

And he ought to prescribe to have *decimam garbam*, or *decimum cumulum granorum*; not *pro decimis garbarum*: for they are not tithes properly, but a profit apprender. *R. Cro. El.* 599.

(C 5.) To a Patentee.

So now, by *st.* 27 *H.* 8. 28. patentees of all manors, lands, tenements, tithes, pensions, churches, portions, &c. or other hereditaments of abbeys, &c. dissolved heretofore or by this act, shall enjoy the same according to the effect of such letters patents; and shall have the same remedies, &c. as the abbots, &c. could have had.

So, patentees of lands, tithes, &c. given to the king by *st.* 31 *H.* 8. 13. 37 *H.* 8. 4. or 1 *Ed.* 6. 14. which by construction of those statutes and the *st.* 32 *H.* 8. 7. and 1 & 2 *Ph.* & *M.* 8. are become temporal inheritances. *Co. L.* 159. a.

And by *st.* 32 *H.* 8. 7. and 1 & 2 *Ph.* & *M.* 8. those patentees shall have the same remedy for recovery, &c. and the same means for assurance of such tithes, &c. as for other temporal inheritances. *Vide post.* (M 18.—N).

And may sue in the ecclesiastical court for withholding such tithes, &c. *Vide post.* (M 2, 3.)

So,

So, by *ft. 2 & 3 Ed. 6. 13.* they may recover the double value if predial tithes be not set out, &c. *Vide post.* (M 2.)

[If a patentee claims the tithes of a manor, &c. formerly belonging to an abbot, who was seised thereof *as of a portion of tithes in gross*, and his evidence mentions only *omnes vel omnimodas decimas*, &c. without mentioning *a portion*, it is sufficient to support it. *Downer v. Mooreman, H. 1724, Bunb. 189.*]

Vide ante, (C 3, 4.)

(D) By whom payable.

ALL persons generally ought to pay their tithes to whom they are due.

And therefore, of common right all lands ought to pay tithes.

11 Co. 15. a.

Tho' held *in capite*. *Mo. 915.*

The tithes shall be paid by the occupier of the same lands,

If the owner occupies them, he shall pay.

If he leases them for a year, or at will, &c. the lessee shall pay.

If the owner or lessee sells the crop of grass or corn, and the vendee cuts it, he shall pay the tithes. 2 Bul. 184.

So, if the owner of wood sells to another, who cuts it; he shall pay.

If the owner of the land sells the crop, and then purchases the rectory, the vendee shall pay tithes to him. R. 2 Bul. 184.

If the occupier be a disseisor, &c. and sets out his tithes, the parson may take them; for it is not material whether he has the possession by right, or by wrong. R. Jon. 89, 90.

But if the owner consumes his herbage by agistment of the cattle of another; the owner of the cattle does not pay the tithes. 1 Jon. 254. 1 Rol. 636. l. 15.

If a parson, &c. at common law, had enfeoffed another of his glebe; the feoffee paid tithes: for tithes are not extinguished or suspended by unity of possession. 11 Co. 13. b. Dy. 43. a. *Vide ante* (A).

So now, if a parson leases his glebe, the lessee shall pay tithes. *Dub. Dy. 43. a. Per Fenner, 1 Rol. 655. l. 42.*

Tho' he leases it with all profits belonging, rendring rent for all demands to the same rectory belonging. R. 11 Co. 13. b. *Cro. El. 161. Cont. per two J. Mo. 47. Acc. Dy. 43. a. in marg. Ow. 39. 1 Leo. 300.*

So, if a parson sells the *emblements* of his glebe, the vendee shall pay tithes. 1 Rol. 655. l. 45.

If a vicar sows his glebe, and dies before severance, his executor shall pay. *Dub. Hob. 188.*

If a parson leases his rectory, he shall pay tithes to his lessee for his other lands in the same parish. 11 Co. 14. a. R. Dy. 43. a. *Mo. 532.*

If he leases his rectory, reserving the tithes of his own land, and afterwards grants this land; the grantee shall pay tithes. *Semb. Dy. 43. a. in marg.*

But if a parson lets his glebe rendring rent for tithes after growing, as well as for other demands; the lessee shall not pay tithes to him. *Semb. Cro. El. 161.*

(E) By whom not.

(E 1.) Not *per Ecclesiam Ecclesie*.

ONE spiritual person, generally, does not pay tithes to another: as, if a vicar be endowed of glebe and small tithes; he shall not pay tithes of his glebe to the parson. *R. Cro. El. 479. 579. Sav. 3.*

So, a parson shall not pay tithes to the vicar, for his glebe. *Mo. 457.*

So, if a vicar be endowed of small tithes, generally, the parson shall not pay small tithes to the vicar. *R. Cro. El. 578. Mo. 910.*

Tho' the endowment be of the small tithes of the whole parish. *R. Cro. El. 578. Mo. 910.*

So, a patentee of a parsonage shall not pay: for the parsonage being discharged at the time of the endowment, and afterwards at the dissolution, the patentee shall have it discharged. *R. Cro. El. 578.*

So, if land be severed from the glebe after endowment, it shall not pay tithes to the vicar. *R. 2 Rol. 335. l. 10.*

But the lessee of the parson shall pay small tithes to the vicar. *R. Cro. El. 479. 578. Mo. 910. Sav. 3.*

So, the parson himself shall pay, if the endowment was of tithes of the glebe expressly, as it might be. *Cro. El. 578. Mo. 910.*

Or, the land comes to the parsonage after the endowment. *Vide Mo. 910.*

Or, if the parson has lands not parcel of the rectory. *11 Co. 14. a. Vide ante (D).*

(E 2.) By those who prescribe in *non decimando*.

(E 2.) *Who may prescribe. Spiritual persons.*] So, a spiritual person may prescribe in *non decimando*. *2 Co. 44. b. 1 Rol. 653. l. 10. Cro. El. 475. 1 Leo. 248.*

And therefore, a bishop may prescribe, that he and all his predecessors, seised of such a manor in right of his bishopric, have held the manor by them and their tenants, discharged of tithes. *R. 2 Co. 44. 5. 1 Rol. 653. l. 15. Cro. El. 216. 1 Leo. 248. Mo. 425.*

And his tenant of the manor, by such prescription, may be also discharged: for the demise does not make the land chargeable, which was discharged before. *R. 2 Co. 45. a. 1 Rol. 653. l. 25. Cro. El. 475. 511. Mo. 619.*

So, the copyholders of the manor may allege a prescription in the bishop for their discharge. *R. 1 Rol. 653. l. 40. Cro. El. 784. Mo. 618. Yel. 2.*

So, a parson, having glebe in another parish, may prescribe in *non decimando*, for him, his farmers, and tenants. *R. 1 Rol. 653. l. 30. Mo. 531.*

So, an abbot, or other ecclesiastical body, might prescribe in *non decimando*. *Vide Mo. 531.*

So, if a manor, land, &c. of a bishop, parson, &c. be granted to another in fee, and afterwards regranted to the bishop and his successors; the prescription is not destroyed. *R. 1 Leo. 248. Cro. El. 216.*

(E 3.)

[E 3.] *The king.*] So, the king may prescribe *in non decimando*: for he is *persona mixta*. R. *Jon.* 387. R. *Hard.* 315. *Mo.* 486.

As, for tithes of the lands of a forest, tho' they are within a parish. *Sti.* 137. R. *Ca. Eq.* 230.

Tho' the land be demised at the king's will. *Mo.* 915.

But the king's patentee shall not have the same privilege. R. *Jon.* 387. *Cro. Car.* 94. 1 *Rol.* 655. l. 25. *Hard.* 315.

So, without a particular prescription, the king shall not be discharged of tithes for the ancient demesnes of the crown. R. *Hard.* 315. *Semb. Sti.* 137.

So, when discharged by prescription, if he aliens the land, the prescription is destroyed: and therefore, if afterwards the same land, by escheat, &c. comes back to the crown, it shall not be discharged of tithes. R. *Hard.* 315.

So, a lessee for life or years of the king, shall not have the same privilege. *Mo.* 915. *Qu.* If this does not relate to monastery-land? *Vide post.* (E 7.) R. that a lessee for years of the king, rendring rent, shall have privilege, if the king prescribes for him and his tenants to be discharged. *Per Cur. Exch. M.* 6 *Geo.* 2. *inter Williams and Petchy.*

[E 4.] *A county, &c.*] So, a county may prescribe *in non decimando*. 1 *Rol.* 653. l. 50.

So, a county, as the *Weld of Kent*, or *Sussex*, may prescribe in non-payment of tithes of wood. 1 *Rol.* 653. l. 52. 654. l. 5. 2 *Rol.* 122. *Pal.* 37. 2 *Inst.* 645. 653.

So, an hundred. *Semb.* 1 *Rol.* 654. l. 30. *Mar.* 25. pl. 59.

So, a man may prescribe, that by the custom of the country where he lives, no tithes are paid for the milk of ewes. R. 1 *Rol.* 654. l. 15.

That by custom a baker does not pay tithes for grain which he grinds in his mill for his trade, whereby the parson has more ample tithes: for this is but a personal tithe. R. 1 *Rol.* 654. l. 20. 4 *Mod.* 337.

But a parish cannot prescribe *in non decimando*. 1 *Rol.* 653. l. 47. 2 *Inst.* 645. *Mar.* 25. pl. 59.

So, a custom *de non decimando* cannot be alleged in an hundred or county, for things which of common right ought to pay tithes: as, for agistment of cattle. R. 4 *Mod.* 344. *Sal.* 655. *Carth.* 392. *Skin.* 560.

[E 5.] *Who cannot prescribe.*] But, generally, a layman cannot prescribe *in non decimando*. 1 *Rol.* 653. l. 5. R. 2 *Co.* 44. *Mo.* 425. *Hob.* 297.

As, churchwardens who have lands for the repair of the church: tho' their office be ecclesiastical. 1 *Rol.* 653. l. 1. 31.

And therefore, if an abbot and convent, &c. grant land to a layman, or are dissolved, whereby the lands come to a layman; tho' the abbot had prescribed *in non decimando*, the layman cannot: for the privilege is gone. R. *Jon.* 373.

So, the pope by his bull could not discharge a subject from payment of tithes after the council of *Lateran*. 2 *Inst.* 653.

Yet if an abbot, or prior, was seised of lands discharged of tithes, the present farmer of such lands shall be admitted to prescribe *in non decimando*

decimando by force of the *ft.* 2 & 3 *Ed.* 6. 13. which says, that every person shall pay predial tithes in such manner as of right ought to be paid in forty years before. *Mo.* 219.

And by that *ft.* 4. no person shall be compelled to pay tithes for lands, &c. by law or statute, or by any privilege or prescription not chargeable with payment of tithes, or discharged by composition real.

And, *per Hobart*, if a person temporal succeeds a body spiritual in discharge; he shall be reputed as a person or body spiritual. *Hob.* 296.

So, where lands came to the king by the *ft.* 31 *H.* 8. 13. lands discharged by prescription in the hands of an abbot, &c. shall be discharged in the hands of the king, or his patentee. *R.* *Jon.* 373. *Vide post.* (E 7.)

[There can be no prescription in *non decimando* against a lay rector, any more than against a spiritual rector; but there may against one who only entitles himself to tithes. *Charlton v. Charlton*, *H.* 1732, *Bunb.* 325. *Bury v. Evans*, *T.* 1739, *Bunb.* 345. (*Com.* 643. *S. C.*)]

(E 7.) By the King, or a Patentee of Lands given to the Crown by the *ft.* 31 *H.* 8. 13.

So, by the *ft.* 31 *H.* 8. 13. (which dissolves all houses of religion above 200 *l.* a-year value,) the king and his patentees shall hold all manors, lands, &c. belonging to such houses, discharged of the payment of tithes, as freely as the abbots, &c. held the same at the day of their dissolution.

And this privilege extends to all lands given to the king by the *ft.* 31 *H.* 8. 13.

Tho' they were lands appurtenant to abbeys, &c. given to the king by the *ft.* 27 *H.* 8. 28. but continued by the king pursuant to a *proviso* in the same statute, and not dissolved till the *ft.* 31 *H.* 8.

But lands appurtenant to houses of religion given to the king by the *ft.* 27 *H.* 8. 28. which dissolved the lesser abbeys, &c. under the value of 200 *l.* a-year, are not exempted from payment of tithes. *Jon.* 3. 185. 370. *R.* 2 *Cro.* 608. *R.* *Cro. Car.* 425. *Jon.* 370.

Nor, lands, which came to the crown by the *ft.* 37 *H.* 8. 4. or 1 *Ed.* 6. 14. 2 *Co.* 46. *Jon.* 4. 185. *Mo.* 420. 913.

If they are not exempted by a real composition, or *modus decimandi*;

Tho' they were after the dissolution granted by the king to a greater abbey dissolved by the *ft.* 31 *H.* 8. *R.* *Jon.* 3. 2 *Cro.* 608.

Nor, lands which are vested in the king by the *ft.* 32 *H.* 8. 24. which has the same words as the first clause of the *ft.* 31 *H.* 8. 13. but not the subsequent clause of discharge. *R.* 2 *Cro.* 58. *Cont. per three J.* *Jon.* 190. *R.* *Ray.* 225. *Cont. Acc. Mo.* 913. *Vide Ca. Eq.* 225. *Dub. Godb.* 392. *Bridg.* 32. *Dub.*

An abbot, &c. might be exempt from the payment of tithes by the pope's bull, by his order, by prescription, by real composition, or by unity of possession. *Jon.* 3. 368. 2 *Cro.* 608. *Hob.* 296. *Poph.* 156.

The pope by his bull used to exempt whom he pleased from payment of tithes, and such exemption was allowed for good. *Jon.* 368.

And tho' such exemption ceased by the dissolution of the body to whom granted, being personal; yet, if any abbot, &c. had an exemption

tion by bull at the time of the dissolution, the lands shall be now exempt by the *st.* 31 H. 8. *Per Hob.* 297. *Jon.* 3.

So, by divers grants of the pope, several religious orders were exempted from the payment of tithes, *quamdiu propriis manibus terras colebant.* *Cod. Ju. Eccl.* 701.

But by pope *Adrian* the 4th, these orders were reduced to *Cistercians*, *Hospitallers*, and *Templars*. 2 *Inst.* 652.

To whom the *Præmonstratenses* were added by *Innocent* the 3d, anno 1215. 2 *Inst.* 652.

And by the council of *Vienna*, anno 1311, 4 *Ed.* 2. the *Templars* are condemned for heresy; and 17 *Ed.* 2. their possessions given to the king.

And by the *st.* 2 H. 4. 4. all orders, which put a bull in execution for discharging lands from tithes in the hands of their tenants or farmers, incur a *præmunire*.

And therefore, all lands which belonged to an abbey, &c. of the order of *Cistercians*, or *Præmonstratenses*, (for *Hospitallers* were afterwards dissolved by the *st.* 32 H. 8. 14. and the *Templars* before the *st.* 17 *Ed.* 2.) at the time of the dissolution, by force of the *st.* 31 H. 8. 13. shall be exempted from tithes, in the hands of the king, or his patentees. *Hob.* 297. *Ow.* 46.

Wood or meadow as well as arable. *Dy.* 277. *b. in marg.*

[Right of common may be discharged as well as lands. *Lambert v. Cumming*, *M.* 1723, *Bunb.* 138.]

So, they shall be exempted in the hands of the king's tenant, in respect of his dignity. *Ow.* 46. 2 *Leo.* 71.: for the king does not occupy himself; and therefore, his farmer or tenant shall be exempted, if he be tenant for years, or at will, and the freehold is in the king. *Mo.* 915. *Hard.* 382.

And in the hands of tenant in tail as well as in fee. *R. Hard.* 174.

Tho' there was a subsequent contract or covenant by the abbot, &c. after the council of *Lateran* to pay tithes. *R. Hard.* 101.

So, the reversion shall be exempted, if they were in the hands of a lessee for life, or donee in tail, at the time of the dissolution. *R. Hard.* 190. 4 *Leo.* 47.

Or, in the hands of a lessee for years who paid tithes at the dissolution. *R. Dy.* 277. *b.* *R. Pal.* 119. *R.* 2 *Cro.* 559. 2 *Rol.* 142.

But lands purchased by those orders after the year 1215, were not exempted, for the exemption extended only to lands then in their possession. *Cod. Ju. Eccl.* 701. 2 *Inst.* 652.

[And if they have paid tithes, it will induce a presumption that they were purchased after. *Bunb.* 122.]

So, lands which belonged to those orders, shall not be exempted in the hands of any who has them only for years, or for life. *R. Hard.* 174.

So, lands which escheated to an abbot, and continued in his hands at the time of the dissolution, shall not be exempted. *Semb. Hard.* 190.

Nor, land granted in tail by an abbot, &c. and in the hands of the donee at the time of the dissolution. *R. Hob.* 248.

Nor, the lands of a copyholder, held of a manor, which was in the hands of an abbot at the time of the dissolution. *Mo.* 219. 533, 4.

Nor,

Nor, lands exempted in the hands of an abbot by reason of his possession, but not discharged at the time of the dissolution. *Godb. 1.*

Nor, lands in which a man claims *libertatem falcandi*; as, a common. *R. 2 Bul. 249.*

So, an abbot, &c. might waive this privilege, by composition, &c. *Semb. Hard. 383.*

So, where an abbey, &c. was discharged by prescription at the time of the dissolution, the king, or his patentee, shall be now discharged by force of the *stat. 31 H. 8. 13. Cro. El. 206.*

And it is sufficient to prove the prescription, if he gives evidence that the abbot, &c. did not pay. *R. Cro. El. 206.*

[But hearsay and belief is not sufficient evidence of non-payment to shew that the lands were exempt. *Clark v. Daffwood, in Sc. T. 1720, Bunb. 66.*]

[If a general exemption is insisted on, but not proved, a partial exemption for one species cannot be admitted in proof. *Leigh v. Maudsley, H. 1730, Bunb. 296.*]

An abbot, or other spiritual person, might prescribe *in non decimando*; tho' a layman cannot. *R. Cro. El. 206. Vide ante, (E 2.)*

But an abbey, &c. could not be discharged by prescription, where it was founded within time of memory, viz. after the beginning of the reign of king R. 1. *Hob. 300.*

So, if an abbey was dissolved by the death of the abbot and all the monks, the right to tithes revived. *R. Godb. 211.*

[Customary tenants in the North have not the freehold; it is in the lord, so they may prescribe in the name of the lord. *Stephenson v. Hill, H. 2 G. 3. 3 B. M. 1273.*]

(E 8.) By a Real Composition of an Ecclesiastical Person.

So, an abbot, &c. might be discharged by a real composition, as well as a lay-person. *Vide post. (E 21.)*

A real composition was, when land, &c. was given to a parson, with assent of the patron and ordinary, in recompence of all his tithes; by which the land was discharged of tithes, and a *modus* paid in lieu of them. *Jan. 369.*

And this discharge went along with the land, into whatever hands it came. *Jon. 369. Cro. Car. 423.*

So, by a composition between the convents of two abbeys, *median-tibus abbatibus*, a sum of money might be paid to one abbey for tithes of the lands of the other abbey. *Sav. 5.*

And if both abbeys come to the king, his patentee shall have the composition against the patentee of the lands; for if the composition fails, the tithes ought to be paid *in specie*. *R. Sav. 5.*

So, if an abbot, &c. had a manor and portion of tithes, viz. tithes of the same manor *simul & semel*, and before time whereof, &c. viz. 25 H. 1. granted the manor and tithes to A. and his heirs, rendering 5 s. *per annum*, who time whereof, &c. paying 5 s. to the abbot, and after the dissolution, to the king, have been exempted; it shall be a good discharge. *R. 2 Mod. 321. Skin. 239.*

So, a prior composition may be explained by a subsequent. *Semb. Hard. 383.*

But an abbot, &c. not paying tithes at the time of the dissolution;
it

it shall not be intended that he was exempted by a real composition, if it be not shewn: but by his personal privilege, which was the usual course. *R. Per three J. Cro. cont. Cro. Car. 423. 1 Rol. 654. l. 40. Jon. 370.*

(E 9.) By Unity.

So, an abbot, &c. might be exempted from payment of tithes by a perpetual unity of possession, viz. when an abbot, &c. time whereof, &c. was seised of land and also of the rectory of the same parish, where the land lies. *R. 2 Co. 47. b. Per Dyer two J. cont. Mo. 46.*

Perpetual unity was not a discharge *de se*; for by the unity the tithes, being collateral to the land, are not extinct; and therefore they are payable, when the unity ceases. *R. Jon. 3. Hob. 297. Pol. 5. R. Mo. 537, 8. 2 Cro. 608.*

But, if land was discharged in respect of unity, at the time of the dissolution, it shall now be discharged by force of the *st. 31 H. 8. R. 2 Co. 47. Dub. 1 Leo. 332. Sav. 62. R. Mo. 420. 533. Cro. El. 584. 2 Rol. 251.*

Tho' at the time of the dissolution the land and rectory were in lease, if the lessee did not pay tithes. *Semb. Pol. 7.*

So, tho' the lessee did pay tithes. *Vide Jon. 412. Vide infra.*

Yet, unity is not a discharge of tithes; but an exemption only from the payment of tithes, and ought to be pleaded accordingly. *Hob. 298. 2 Co. 48.*

So, unity does not exempt from payment of tithes, and ought to be pleaded accordingly. *Hob. 298. 2 Co. 48.*

So, unity does not exempt from payment of tithes, if the unity did not commence by a good title, and was perpetual. *Semb. 2 Co. 47. b. Hob. 298.*

Or, if it commenced within time of memory; as, if an abbey, &c. was founded, or endowed with the land and rectory after the 1st year of *R. 1. Hob. 298. 1 Rol. 54. Yel. 31.*

Or, if the abbot, &c. was not seised of the land and also of the rectory in fee. *Semb. 2 Co. 47. b.*

If he was seised of a manor and rectory, it does not exempt the copyholders of the same manor. *Mo. 219.*

Or, if an abbot, &c. or his tenant or farmer had at any time paid tithes, tho' but part of his tithes, and not the whole. *Hob. 298. Pol. 9. R. 2 Co. 48. a.*

Or, if there was not an annuity of possession at the time of the dissolution, but the land was in lease, and the lessee paid tithes: tho' there was an unity of the freehold and inheritance of the land and rectory. *R. per three J. Mo. 534. Acc. Pal. 119. Vide supra.*

Or, if an abbot was seised of the land and rectory in fee, but not at the time of the dissolution. *Cro. El. 584.*

By common law a spiritual person ought to shew specially, how discharged, viz. by bull, composition, &c. except where he was discharged by prescription. *R. Hob. 297. 2 Co. 48. Noy, 97.*

So, since the *st. 31 H. 8. 13.* the king or his patentee, who pleads a discharge, ought to plead with the same particularity as the abbot himself. *R. Hob. 298. Jon. 6.*

And therefore, he ought to plead that the abbot, &c. by prescription

tion hold the lands discharged of tithes at the time of the dissolution. *Jon. 3 Hob. 299.*

Or, shew how discharged, viz. by bull, composition or unity. *2 Co. 48. b. Hob. 299. R. 1 Lev. 185.*

And if he alleges unity, he ought to conclude, *ratione cuius he was discharged from payment of tithes. Hob. 298. 2 Co. 48.*

And nothing can be traversed but the unity, not the *ratione cuius*, &c. *2 Co. 48. Mo. 534.*

(E 10.) By a *Modus decimandi*.

(E 10.) *What modus is good. Another recompence in discharge.* So, a man may prescribe to be discharged from payment of tithes, because that a *modus* has been paid time whereof, &c, in lieu of the same tithes.

And such *modus* may commence upon a real composition. *Jon. 369.*

A layman as well as a spiritual person may prescribe *in modo decimandi*. *Mo. 531.*

And the *modus* continues tho' the land came to the rector, if they be afterwards severed. *Mo. 531, 2.*

And by *β. 2 & 3 Ed. 6. 13.* no person shall be compelled to pay tithes for any lands, &c. which by prescription, &c. are not chargeable with the payment of any such tithes, or that be discharged by any real composition.

And therefore, a parishioner may allege a custom or prescription to give money or other recompence to the parson; and, in consideration of it, to be discharged from payment of tithes *in specie*.

As he, who being lord of the manor of *B.* has paid such a pension time whereof, &c. to the parson, and *ratione inde* has been exempted from tithes within his manor. *R. Mo. 485.*

That the lord has allotted so much wood to the parson; for which he, and his tenants in the same manor, ought to be exempt from tithes for their under-wood there.

That the parson has such a wood in the same parish rendring 4*d.* to the lord, and therefore the parishioners shall not pay tithes of wood there.

[One penny at *Easter*, for tithe-hay on a farm of 68 acres, allowed; 1*l.* 6*s.* 8*d.* for hay, small tithes, and *Easter* offerings, on a farm of 625 acres, allowed. *Finch v. Masters, P. 1724, Bunb. 161.*]

[Nine cart-loads of logwood for all tithes.]

[A hogsheaf of cyder.]

[Two-pence *per* acre, without setting forth when nor by whom established, after a verdict. *Sed qu. Wolferston v. Manwaring, H. 1729, Bunb. 279.*]

[A halfpenny *per* calf, in lieu of calves.]

[A smoak-penny, in lieu of fire-wood burnt in his house.]

[A halfpenny for wool of each sheep dying between *Candlemas* and *Shear-day*.]

[Four-pence *per* month for wool of every 100 sheep brought in after the 2d of *February*.]

[If ten lambs, one to the rector on *St. Mark*; if nine, one to rector paying a halfpenny; if eight, one paying a penny; if seven, one paying a penny halfpenny; for less number, no lamb, but a halfpenny

penny to rector for each lamb under seven; and where ten lambs, parishioner takes two, and then rector chuses his one.]

[The same as to pigs.]

[Three eggs for every cock, hen, drake or duck, in lieu of tithe-eggs, chickens and ducks. *Brinklow v. Edmonds*, M. 1731, *Bunb.* 307.]

[*Modus* may be established without trial at law, if the parson has no proof. *Ibid.*]

(E 11.) *Another thing for the benefit of the parson.*] So, it shall be a good *modus*, that the parishioner has done more than he need do for the improvement or melioration of the tithes for the benefit of the parson, and in consideration thereof has been excused from tithes for another thing: as, that he bound the corn in sheaves, and afterwards put it in stack for the parson, and therefore has been discharged of tithes of so many sheaves as are not put in stack. *Latch*, 226.

So, that every parishioner has used at his proper costs to make the grass of the first mowth into hay, and then to deliver the tithe to the parson, and therefore has been excused from the tithes of the after-mowth. *R. 2 Cro.* 42. *1 Rol.* 648. *l.* 46.

Or, has cut the first mowth, and tedded and dispersed it, and then gathered it into wind-rows, and put it in small cocks; for this is more labour and charge than the law requires. *R. 2 Cro.* 42. *Mo.* 758. *1 Rol.* 648. *l.* 52.

So, that the parishioner has delivered straw to the parson for his seat in the church, and therefore has been discharged of tithes for his hay. *Semb. Cro. El.* 277.

That he pays 5 s. to the clerk, by which the parson is excused from finding a clerk, and therefore he ought to be exempted from tithes. *Semb. Cro. El.* 71. *Vide post.* (E 15.)

So, that the parishioner cuts tares, &c. for the beasts of the plough, or cows, and therefore does not pay tithes of them. *R. Cro. El.* 139.

That he pays a halfpenny for the wool of sheep sold between shearing and Michaelmas. *Mo.* 911.

(E 12.) *Tho' the modus be paid to another.*] So, a *modus* paid to the parson for hay, in lieu of all tithes upon the same land, shall be a good discharge for tithes of the same land demanded by the vicar. *R. Tel.* 86. *Vide post.* (E 15.)

(E 13.) *Tho' there be some alteration in the thing for which the modus is paid.*] So, if there be an alteration of the thing for which the *modus* is paid, the *modus* continues, if the thing for which be not destroyed: as, if a current upon which a mill is erected, be diverted by the act of God, and the owner removes his mill to it, the *modus* for the mill remains. *1 Rol.* 652. *l.* 10. *Vide post.* (E 20.)

If a *modus* be for tithe of hay in such a close, and it is ploughed for seven years, and afterwards returns to hay; the *modus* continues. *2 Sho.* 462.

If a *modus* be of so much a-year for tithes of so many acres of land in such a park; the *modus* continues, tho' the park be disparked. *Cro. El.* (467.)

So, if a *modus* be to pay a buck and doe generally, for tithes of land in such a park. *Semb. Ow.* 34.

Or, 2 s. for tithes of land in a park, and a shoullder of a deer. *R. Godb.* 238. *Per Hobart and Nichols; Winch and Warb. cont. Hob.* 39. *M.* 863. *1 Rol.* 651. *l.* 51.

(E 11.) *When a modus is not good. If it be not time whereof, &c.]* But a *modus decimandi* is not good, where the thing for which the *modus* is alleged to be paid is not antient: as, a *modus* cannot be alleged for tithes of hops. *R. 1 Vent.* 61. *1 Sid.* 443.

[There can be no *modus* for turkies, because lately brought to England. *Brinklow v. Edmonds, M.* 1731, *Bunb.* 307.]

So, if a *modus* be so large, that it is not possible to be the valuation for such tithes time whereof, &c.: as, if he alleges a *modus* to pay 2 s. 6 d. for every tithe-lamb. *H. 9 W.* 3. *Layfield Rector of Chiddingfold in Surry v. Entiknap.*

To pay 5 s. an acre for tithes of wheat; 4 s. for summer corn; 3 s. for meadow; 2 s. 6 d. an acre for pasture. *H. 3 Geo. Benson Improprator of Bromly St. Leonard in Middlesex v. Watkins and others.*

To pay 6 d. for every calf, (which in that country never exceeds 5 s. value after three weeks,) *M. 5 Geo. Jones Rector of Downham in Cambridgeshire v. Cawthorn and others. T. 7 Geo. Franklin v. the Master and Brethren of St. Cross near Winchester.*

[A *modus* of 4 l. 10 s. for a farm of 30 l. too rank. *Kennedy v. Goodwin, P.* 1731, *Bunb.* 301.]

Yet a *modus* may begin after endowment temp. *H. 3. Semb. Godb.* 180.

(E 15.) *If it does not import a benefit to the parson, &c. beyond what the law requires.]* So, if a man alleges a custom or prescription to be discharged of the tithes of such a particular, in respect that he has done what is not more than the law requires, or no benefit to the parson, it will not be a good *modus*: as if he says, that he pays tithes of his meadow and 2 d. for every cow, and therefore ought to be excused from tithes for hay out of the fens in the same parish, which he uses for fodder for his cows. *R. 2 Cro.* 47. *Mo.* 683.

That he is bound by tenure of such land to maintain *navem ecclesie*; and therefore ought to be excused: for it is no benefit to the parson. *Vide 1 Rol.* 649. *l.* 50.

That he ought to pay so much to the rector, is no excuse for tithes due to the vicar. *Cro. El.* 71. *Mo.* 907. *R. 3 Bul.* 220. *Vide ante, (E 12.)*

Or, 5 s. *per annum* to the parish-clerk, is not a good *modus* for tithes to the rector. *Cro. El.* 71. 276, 7. *1 Leo.* 94. *Vide ante, (E 11.)*

So, it is not a good *modus*, that all the tenants of a manor ought to pay such a rent to the lord, and therefore ought to be discharged of tithes of all their lands in any place.

That he ought to find straw *pro nave ecclesie*; and therefore ought to be discharged of tithes for his pay: for the parson need not find straw. *R. Cro. El.* 276.

That he ought to make the gras upon the first mowth into small cocks; and therefore shall be discharged of tithes of the after-mowth: for it is no more than by law he ought to do. *R. Mo.* 758.

That

That the tenants of a manor are discharged, &c. because they pay so much quit-rent to their lord. *R. 1 Sid. 258.*

Or, maintain a chaplain in the church of *D.* without shewing that it is in the parish where the manor lies. *Semb. 1 Rol. 2.*

That he pays one penny for every milch-cow, and a halfpenny for every other cow, for tithes of all-cows, oxen, steers, calves. *R. Cro. El. 446. Vide post. (E 16.)*

Or, one penny for every mare, for tithes of all horses, mares, colts. *Cro. El. 446.*

That for payment of full tithes for sheep which he has upon his land at *Candlemas*, he shall be exempt for the whole year from tithes for sheep. *R. 1 Mod. 229.*

That he pays every ninth night and tenth morning all his milk, from the tenth of *May* till a lamb bleats in the parish, in lieu of all tithes of milk in the parish. *R. Carth. 461.*

[To pay every tenth evening and morning's milk in kind, from *Hoc-Monday* (i. e. *Monday* fortnight after *Easter*) to 2d *November*, not good *modus* for milk. *Brinklow v. Edmonds, M. 1731, Bunb. 307.*]

[By act for inclosing common, the lands divided shall be holden by each person to whom they are allotted, subject to the same charges as their own former lands were; 90 acres are allotted to the owner of *S.* which was exempt from tithe of corn, grain, and hay (but not of common); the impropiator is not party to the act, and all rights, &c. saved; the 90 acres are not exempt from tithe. *Moncafter v. Watfon, P. 3 G. 3. 3 B. M. 1375.*]

(*E 16.*) If it be to pay one species of tithes in satisfaction for another species.] So, it is not a good *modus*, if a man prescribes to pay one species of tithes in recompence of another species: as, if he allege a prescription to pay the tenth cock of hay, for all the tithes of his hay. *R. Cro. El. 786. (a)*

Or, a moiety of the tithes in such a close, for all tithes of hay there. *Semb. cont. Godb. 120.*

Or, the tenth sheaf of corn, for all tithes of his corn. *Cro. El. 786. Mo. 278. Sav. 100.*

Or, the 7th calf, the parson paying three halfpence; the 8th, he paying a penny; and a halfpenny for every one under 7, in recompence for all tithes of his cattle. *R. Cro. El. 786. 139.*

Or, a load of hay, for all hay upon his land. *Semb. 1 Rol. 172.*

A penny for every milch-cow, and a halfpenny for every other cow; for tithes of all cows, steers, &c. *Mo. 909. 911. 1 Rol. 651. l. 11.*

Or, for all cattle or agistments. *R. Mo. 454. Cro. El. 446. 475.*

Yet if a payment be of a species in recompence of that species and another thing for which no tithes are payable, it seems good: as, to

(a) The *modus* in *Cro. El. 786.* is, the tenth sheaf of corn, the tenth cock of hay, the tenth fleece of wool, the seventh calf, and the parson to pay 1½ d. and the eighth calf, if he had eight, and the parson to pay 1 d. *Et sic usque* ten; and if he had under seven, to pay only ½ d. for every one, and so after that rate for lambs and colts, and that it was in satisfaction for the tithes of all dry cattle, and for all other tithes of corn, hay, and cattle; *R.* and being only tithes in kind, they cannot be in satisfaction for the tithes of other things than themselves.

pay the tenth shock of corn, for tithes of all corn, grafs, or headlands, and rakings. 2 *Leo.* 70.

[A custom to pay tithe of wool by the pound and not by the fleece, is not a *modus*. *Wilson v. Wilkinson*, *M.* 1 *G.* 2. *Str.* 783.

(E 17.) *If it be not a certain recompence.*] So, it is not a good *modus* if the payment be uncertain: as, that he shall pay a penny an acre, or thereabouts, for every acre of his arable land.

That he shall pay 4 *s.* for every day that he ploughs for wheat, and 2 *s.* for every day that he ploughs for barley.

That he shall pay so much for every calf sold, for tithes of all barren cattle: for perhaps he may not have, or may not sell any. *Cro. El.* 139.

That the inhabitants of such messuages shall pay each 4 *d.* to the vicar, for recompence of his tithes there: for perhaps nobody may inhabit in those houses. *R. Cro. El.* 139.

That the owner of a manor, or any part of it, pays 4 *d.* for tithes of his herbage: for if he has but a foot, he shall pay. 1 *Vent.* 3.

That he pays a *modus* on or about *April*: for he ought to ascertain the time of payment. *Mod. Cu. in L. & Eq.* 375.

[A *modus* to pay 1 *s.* per pound for pasture according to the value of the land, or 1 *s.* per pound according to the value of the rent, is void. *Smith v. Roecliff*, *H.* 1717, in *Sc. Bunb.* 20. *Harrison v. Sharp*, *T.* 10 *G. Bunb.* 174.]

[Distributive *modus* is not good. *Turton v. Clayton*, in *Sc. T.* 1721, *Bunb.* 80.]

[Nor, if the time of payment be uncertain. *Goddard v. Keble*, (the leading case,) *P.* 1722, *Bunb.* 105. *Pemberton v. Sparrow*, *T.* 1722, *Saint Elcy v. Prior*, *H.* 1723, *Ibid.* *Blacket v. Finney*, *T.* 1725, *Bunb.* 198.]

[Several customary payments, tho' they sometimes varied, were established against the tithes of houses in *London*. *Bennet v. Treppas*, *P.* 1722, *Bunb.* 106.]

[That the parishioners carry a cart-load of turf to the parsonage, not good; cart-load uncertain, and no right of turbary alleged. *Tully v. Kilner*, *H.* 1722, *Bunb.* 126.]

[A *modus* of 4 *s.* for tithe-hay arising on his farm, is void; as it may introduce a fraud, if he turn all his arable land into meadow, and it is uncertain of what a farm consists. *Burwell v. Coates*, *P.* 1723, *Bunb.* 129.]

[To pay 3 *s.* 4 *d.* for a score of sheep shorn out of the parish at *Easter*, or otherwise when the sheep shall be sold, void for uncertainty. *Philip v. Symes*, *T.* 10 *G. Bunb.* 171.]

[If the day of payment of a *modus* is omitted in a bill, it is fatal; but in an answer it may be supplied by evidence. *Gibb v. Goodman*, *T.* 1733, *Bunb.* 328.]

[Six shillings and eight-pence for every tenth-calf, without saying, so in proportion if less than ten, is bad. *Ibid.*]

(E 18.) *If there does not appear a remedy for the modus.*] So, if no remedy appears for the *modus*: as, if he alleges, that all occupiers of lands within such a vill pay 2 *s.* for all tithes within the vill: for no remedy

remedy appears if any will not contribute : otherwise, if he says, *quilibet occupator* shall pay for his tithes. 2 *Keb.* 280.

(E 19.) *If apparently unreasonable.*] So, a *modus* apparently unreasonable shall be void : as, to pay a halfpenny for tithes of all willows, &c. cut by him in the same parish ; without saying, for willows cut upon his own land. *R. Godb.* 60.

To pay the tenth lamb of all lambs in the parish. *Hob.* 329.

To pay tithe of milk at the place where his cows are milked. *R. Carth.* 461.

[To set out tithes, (as of wool,) *absque visu & tactu* of the parson. *Christian v. Wren*, *M.* 1732, *Bunb.* 321.]

(E 20.) *How a modus shall be destroyed.*] So, a *modus* may be lost by frequent payment of tithes *in specie*. *Vide Prescription (G).—Ante*, (E 13.)

By neglect to pay the consideration payable as the *modus*.

So, a *modus* shall be destroyed, by the destruction of the thing for which the *modus* was paid : as, if a *modus* be of so much for two fulling-mills, and they are converted to a corn-mill. 1 *Brownl.* 32.

Or, a *modus* be for a pair of stones in such a mill, and another pair be added. 1 *Brownl.* 32. *R. 4 Mod.* 45.

If a *modus* be for a mill on such a stream, and the owner diverts the current, and afterwards erects a new mill upon a new stream. 1 *Rel.* 652. l. 17.

If a *modus* be for hay in 40 acres, and the owner converts them to tillage ; it shall be suspended during the tillage. *Godb.* 194. *Vide* 1 *Rel.* 651. l. 35.

Or, to hops. *Vide* 1 *Rel.* 651. l. 35.

If a *modus* be to pay a buck or doe for tithes of such a park, which is afterwards disparked. *Cro. El.* (467.) *Vide ante*, (E 13.)

Or, a buck or doe out of such a park for tithes of land there.

Or, a shoulder of every buck or doe in the park. *Vide Cro. El.* (467.)

Or, 10 s. *per ann.* for tithes of deer and herbage in the park.

But a *modus* shall not be destroyed by payment of tithes *in specie* for 20 years. 2 *Inst.* 653.

[If parishioners, without consent of parson, divide and inclose a common which was covered by a *modus*, the *modus* is destroyed ; but if with the consent of parson, and an act of parliament passed, that all shall enjoy their rights of severalty as they did their rights of common before, it is not destroyed. *Stockwell v. Terry*, *T.* 1748, 1 *Vesey*, 115.]

(E 21.) By a Real Composition of a Lay Person.

So, a man may be discharged from payment of tithes by a real composition : as, if he or his ancestor has made an agreement with the parson, by assent of the patron and ordinary, to be free from tithes *in specie* against him and his successors, upon such a sum to be paid annually to him and his successors. *Cod. Ju. Eccl.* 705. *Vide ante*, (E 8.)

Or, in lieu of such land given to the parson and his successors.

And of such discharge every one who has the land shall take benefit. *Jon.* 368, 9.

So, every owner of land may make composition with the parson for tithes, during the mutual lives and occupancy of themselves. *Vide post.* (L 2.)

And such composition for a year, by *parol*, will be good. 2 *Cro.* 137.

So, it may be for several years, when made by way of retainer for his own tithes. *Semb. cont. Cro. El.* 249. 2 *Cro.* 137. *But Yel. in the same case Semb. acc. Yel.* 94.

And if there be a composition by an owner, for him and his assigns; the assignee shall have the advantage. 2 *Cro.* 668, 9.

But a real composition shall not be good if it be not by fine or deed. *Vide Cro. El.* 188. 249.

If it be not for them, and their heirs and successors.

So, since the *st.* 1 *El.* & 13 *El.* 10. there cannot be a real composition. *Cod. Ju. Eccl.* 706.

[Decrees have been made in Chancery (since the restraining statutes) to confirm compositions relating to the rights of the church made by parson, patron and ordinary, but always where they were presumed to be for the benefit of the church. *Douglas v. Vane*, II. 19 G. 2. *Willf.* 128.]

So, a composition with a parson during his life, is not good against himself, if it be by *parol* only. *R.* 2 *Cro.* 137. *Hob.* 176. *Yel.* 94. 2 *Roll.* 63. l. 1. *R. Cro. El.* 188. 249.

Nor, a composition for several years; if it be not by way of retainer.

[Composition of the occupier with the agent of proprietor of tithes, binds the principal. *Chave v. Calmel*, P. 6 G. 3. 3 *B. M.* 1873.]

[And it is good by *parol* if the corn is severed. *Ibid.*]

[The same notice must be given to determine a composition for tithes, as between landlord and tenant: and the requisition of due notice has been carried farther in the former case than in the latter: in the latter, where the tenant controverts the right of the landlord, the defect of notice cannot be set up; but in the former, tho' the defendant sets up a *modus*, which controverts the incumbent's right to tithes in kind, and failing of that, insists it is a composition, he may take advantage of the incumbent's defect of notice, that he will terminate the composition. 2 *Brown*, 161.]

(F) The several Kinds of Tithes.

(F 1.) Predial.

TITHES are *predial*, *personal*, or *mist*.

Predial are tithes which arise from the land, spontaneously, or by manurance: as, tithes of corn, hay, wood, herbs, &c. 1 *Roll.* 635. l. 10.

So, wine, flax, and hemp, are predial. 2 *Inst.* 649. 1 *Roll.* 635. l. 17.

So, hops. 1 *Roll.* 635. l. 21.

So, all fruits; as, apples, pears, mast, &c. 1 *Roll.* 635. l. 22. 2 *Inst.* 649.

(F 2.) Mist.

Mist are tithes which arise from cattle and beasts receiving their nourishment

nourishment upon the land: as, calves, lambs, kids, pigs, chickens, &c. 1 *Rol.* 635. l. 15. 30.

So, wool, milk, cheefe, &c. 1 *Rol.* 635. l. 30. 2 *Inst.* 649.

So, eggs. *Cod. Ju. Eccl.* 691.

(E 3.) Personal.

(F 3.) *Who ought to pay them.*] *Personal* are the tithes or *decima pars* of the clear gain which is raised *ex opera personali* of a man, his charges and expences according to his condition and degree being deducted. 1 *Rol.* 656. l. 25. 2 *Inst.* 621. *Cod. Ju. Eccl.* 699. 2 *Inst.* 649.

By the *st.* 2 & 3 *Ed.* 6. 13. every person exercising merchandizes, bargaining and selling, clothing, handicraft, or other art or faculty, being such person, and in such places as have accustomedly for forty years past paid personal tithes, (except day-labourers,) shall pay them yearly at or before *Easter*, viz. the tenth of his clear gains, his charges and expences according to his estate or degree deducted.

By which it appears that personal tithes are of the nature of oblations; which in some places are due by custom. *Vide ante*, (B 1.)

Tithes for a fulling, paper, iron mill, are personal tithes. 2 *Inst.* 621. 1 *Rol.* 656. l. 34. *Vide post.* (H 12.)

So, tithes paid for taking fish, pilchards, herrings, &c. upon the sea. 1 *Rol.* 656. l. 30.

By the *st.* 2 & 3 *Ed.* 6. 13. if any refuse to pay his personal tithes, the ordinary may call him before him, and examine him by all lawful means (other than his own oath) concerning the true payment of them.

(F 4.) *Who are not bound to pay them.*] But by the *st.* 2 & 3 *Ed.* 6. 13. day-labourers are not obliged to pay personal tithes. *Vide ante*, (F 3.)

Nor, servants for the plough, for their wages. 1 *Rol.* 646. l. 25.

Nor, an innkeeper, for gain by the sale of wine or beer. *Cod. Ju. Eccl.* 699. 2 *Bul.* 141.

Nor, a person, for his gain by money put out at interest. 2 *Bul.* 141.

Or, for his gain by the sale of a house, &c. *R.* 1 *Rol.* 656. l. ult.

Nor, for the clear gain which a man makes by the loan, &c. of any thing, without his labour. *Per Dod.* 1 *Rol.* 656. l. 44.

So, a man may prescribe to pay a *modus* for them. 2 *Inst.* 657. *Vide ante*, (E 10, &c.)

(G) Great Tithes.

(G 1.) What are.

SO, tithes are divided into *great* or *small* tithes.

Great tithes are tithes of wood, corn, or hay.

So, tithes of other herbs, which are planted or sown in large quantities, so that the most part of the parish has them, will be great tithes: as, saffron, wood, hemp, flax, &c. *R. Hut.* 78. *Cro. Car.* 28. *Per Holt acc. but three J. cont.* 3 *Lev.* 365.

[Peas and beans set and sowed in rows, drilled, boed, and hand-weeded,
in

in a garden-like manner, where great part of the parish was in that culture, and no endowment nor usage, decreed to be a great tithe. *Gumley v. Birt. T. 10 G. Bunb. 169. Contra infra.*]

(G 2.) What not.

[Potatoes, tho' sown in great quantities in the common fields, are a small tithe: for if the quantity will turn small tithes into great, why will it not turn great into small? There is no case determined, that the rule of tithes shall depend on the quantity, and not on the nature. *Per Hardwicke C. Sed qu. Smith v. Wyat, T. 1742, 2 Atkyns, 364*]

[Peas and beans set in rows and ranks, and hoed and weeded with the hand, in open fields turned only with the plough, are small tithes. *Nicholas v. Elliot, in Sc. affirmed by the Lords. H. 1717, Bunb. 19. N. B. 'Tis said there was proof of usage.*]

[Clover-seed is a small tithe. *Wallis v. Pain, H. 1738, Bunb. 344. Com. 633. S. C.*]

[But herbs in gardens are small tithes. *Pal. 222.*]

So, wool, milk, cheese, and the young of animals. *2 Inst. 649.*

Lambs. *Pal. 220. 222.*

So, wax, honey, &c. *2 Inst. 649.*

So, woad, saffron, &c. generally are small tithes. *R. Cro. Car. 28. Hut. 77. Pal. 220. 222.*

So, flax, hops, tobacco, &c. *Hut. 78. 1 Rol. 643. l. 22. R. per three J. 3 Lev. 365. Carth. 264. Skin. 356. Semb. 1 Sid. 443. 4 Mod. 184.*

Tho' they are sowed in an open field in 30 or 40 acres *sparfim.* *R. Cro. El. 467. Mo. 909. R. per three J. Holt cont. 3 Lev. 365. R. Ow. 74. 4 Mod. 184.*

So, a vicar, endowed *de altaragio & minutis decimis*, may be entitled to tithes of wood, hay, &c. if under such endowment he has taken them time whereof, &c. *R. 2 Bul. 27.*

[Agistment tithe is a small tithe. *1 Wilf. 170.*]

(H) Of what Things Tithes are payable.

(H 1.) Of Common Right.

(H 1.) **TITHES** are payable of common right of all things which *Corn.* annually increase, either spontaneously, or by the industry of the parishioner.

As, of all corn, *viz.* wheat, rye, millet, barley, oats, peas, &c.

Of vetches, tares, &c.

Of woad, saffron, hops, hemp, flax, &c.

Tho' the peas are gathered when green, for sale, or swine. *Vide 1 Rol. 647. l. 15.*

The manner of payment shall be such as the usage or custom of the country allows: as, where it has been usually paid in the sheaf or bundle, it shall be a good manner of setting out of tithes.

By *Can. Ro. Winchelsey, 1305. Decima de frugibus, non deductis expensis, integra & sine diminutione, solvantur. Vide Cod. Ju. Eccl. 692.*

But no tithe ought to be paid for the rakings of corn, where it is not dispersed by fraud. *2 Leo. 28. 1 Rol. 379. 1 Rol. 645. l. 30. R. Mo. 278. 910. Cro. El. 475. 660. 702. 2 Inst. 652.*

Nor,

Nor, for peas gathered green to be eaten in his family. 1 *Rol.* 647. l. 14.

Nor, for stubble. 1 *Rol.* 640. l. *Lut. Yel.* 86, 7. 2 *Inst.* 652.

So, by custom, tares, vetches, &c. cut when green, for the beasts of the plough, may be exempted from the payment of tithes. *R. Jon.* 357. *R.* 2 *Leo.* 27, 8. *R. Cro. Car.* 393.

(H 2.) Hay.] So, tithes are due of all grafs cut for hay: *de fanis ubicunque crescant.* *Can. R. W.* 1305. *Vide Cod. Ju. Eccl.* 692.

Tho' it be clover, or other grafs of modern use. *Carth.* 264.

Of every crop, where two or more crops are taken in one year.

Of grafs in an orchard, &c. tho' tithes be paid for the growing there. *Vide 2 Inst.* 652.

Of hay used for cattle of the plough, or dairy. 2 *Cro.* 47.

So, of fodder for them, taken out of fens. *R.* 2 *Cro.* 47. *Mo.* 683.

Tho' it be for cattle which manure his land. *Mo.* 683.

So, of after-mowth, except where there is a discharge by prescription. 1 *Rol.* 640. l. 40.

Tithe of hay may be set out in grafs-cocks. *R.* 1 *Rol.* 644. l. 5. 2 *Mod. Ca.* 117. (2d Part.)

But where by custom or usage it has been paid in hay-cocks, it ought to be so. *Semb.* 1 *Rol.* 172.

And if it be set out in grafs-cocks, the parson may come upon the land to make hay of it; and a custom to the contrary would be void. *R.* 1 *Rol.* 420.

But tithes shall not be paid for grafs upon headlands left for turning of the plough, if it be cut for hay. *Per two J. Lit.* 13. *Lane.* 16.

Nor, for grafs cut upon balks in corn-fields. 2 *Inst.* 652.

Nor, for stubble of corn, or fern. 2 *Inst.* 652.

Nor, generally, for after-mowth of meadow; where a man prescribes to be discharged, as he may, by payment of the tithes of the first mowth. 1 *Rol.* 640. l. 40. *R.* 2 *Cro.* 116. *Cod. Ju. Eccl.* 706. *Mo.* 910. *Cro. Car.* 403. *Cro. El.* 660. *Hob.* 250.

Nor, for pasture, after tithes paid of the hay. *R.* 1 *Rol.* 640. l. 45. *Cod. Ju. Eccl.* 706. 2 *Inst.* 652.

Nor, for grafs cut in a meadow for beasts of the plough, if it be not made into hay. 2 *Leo.* 28. 1 *Rol.* 645. l. 5.

Nor, for agistment in after-pasture, after tithes paid of the hay. 1 *Rol.* 640. l. 52. 641. l. 10.

Or, upon the grafs of fallows; for the fallow is for the increase of tithes of corn the next year.

Nor, by custom, for grafs of headlands cut for beasts of the plough. *R. Cro. Car.* 393.

(H 3.) Wood. Of what wood tithes shall be paid.] So, of common right, tithes shall be paid of *silva cadua* which is not great wood or timber. By *canon* 16 *Ed.* 3. it was declared, that all wood was *silva cadua* & *decimabilis*; but by *Parl.* 17 *Ed.* 3. & 18 *Ed.* 3. it was agreed, that no tithes be paid of wood but where they used to be given. By *Parl.* 21 *Ed.* 3. that they be paid only of underwood. And now, by the *st.* 45 *Ed.* 3. 3. *Conf.* 47 *Ed.* 3. if demanded of great wood of 20 years or above, a prohibition

bition goes. 1 *Rol.* 637, 638, 639. l. 35. *Pal.* 38. *Seld. H. of T.* 3 vol. 1200.

And tho' 2 *H.* 4. and 2 *H.* 5. it was desired, that all wood of 20 years or more should not be tithable, it was denied. 1 *Rol.* 639. l. 5. 15.

And therefore now, tithes shall be demanded, unless it be of great wood; for if it be of great wood a prohibition goes: if of *silva cadua* generally, a consultation goes for the tithes of *silva cadua, dum de grossis arboribus non agatur.* 1 *Rol.* 640. l. 2. *Reg.* 44.

As, of all underwood under the age of 20 years, tithes ought to be paid.

So, of underwood cut for fuel, tho' it be above 20 years growth. *R.* 1 *Sid.* 300. 1 *Lev.* 189. *D. Pal.* 38.

And tho' there be great trees growing *sparsum* in it. 1 *Sid.* 300.

Or, a small quantity of oak, &c. be mixed in the faggots of the underwood. *R.* 2 *Lev.* 79.

Tho' used in his house in the same parish. 1 *Sid.* 447.

So, of oak, ash, elm, or any other trees cut under the age of 20 years, tithes ought to be paid. *R. Cro. El.* 1. *Per two J. cont. Cro. El.* 55.

[Trees above 20 years growth, if cut and corded for fuel, and the bark, are tithable. *Greenaway v. The Earl of Kent*, *Buckle v. Van-acre*, *Adon v. Smith*, *Franklin v. Jones*, *Cropper v. Layfield*, *Bunb.* 98. *Sed. qu.*]

So, of willow, hazel, holly, maple, birch, alder, thorn, &c. in a country where they are not used for timber, (as generally they are not,) tithes ought to be paid; tho' they be above the age of 20 years, and of whatever age or bigness. 1 *Rol.* 640. l. 25. *R.* 2 *Cro.* 199. *Mo.* 907. *Cro. El.* 1. 1 *Brownl.* 94. *Hob.* 219.

So, of beech, hornbeam, &c. in a country where they are not used for timber. 1 *Rol.* 640. l. 24.

[Whether beech is esteemed timber in a certain county, shall be tried by issue. *Bibye v. Huxley*, *H.* 1724, *Bunb.* 192.]

Tho' growing in the defence of the house, and the cutting them is waste. *Hob.* 219. 1 *Rol.* 640. l. 32.

Tho' cut for fuel or fences, unless where exempted by custom. *R. Cro. Car.* 113.

Or, are consumed in the house of a farmer, by which means the parson has *uberiores decimas.* 1 *Vent.* 75.

So, of broom, furze, &c. *Cod. Ju. Eccl.* 708. 710. *Godb.* 44.

So, of a nursery of young trees for transplanting. *R. Jon.* 416. *R. Hard.* 380. *R.* 1 *Rol.* 637. l. 20. *Cro. Car.* 526.

So, tithes are paid of acorns, &c. of timber: for they increase annually. 11 *Co.* 49. 1 *Rol.* 640. l. 37. *Cod. Ju. Eccl.* 706. *cont.* where they were not gathered and sold, but eaten by the swine. *Hill.* 27. (*Vide Lit.* 40.) *Acc. Mo.* 762.

[A parish cannot prescribe in *non decimando* for tithe-wood, and therefore the occupiers must always set forth an exemption. *Jordan v. Colley*, in *Sc. P.* 1720, *Bunb.* 61.]

(H 4.) *Of what not.*] But since *fl.* 45 *Ed.* 3. 3. no tithes ought to be paid of great trees of the age of 20, 30, or 40 years: and if they are demanded of such trees, a prohibition goes:

As, of oak, ash, elm, of above 20 years growth for they are timber throughout the whole kingdom. So,

So, of beech, maple, &c. or other trees in a country where they are used for timber. 1 *Rel.* 640. l. 30. *Mo.* 541. *Noy.* 30. 2 *Rel.*

83. Tho' oaks, &c. of above 20 years are decayed, and only fit for fuel. *Ms.* 541. *R. Cro. El.* 477.

So, if oaks, &c. are topped within the age of 20 years, and afterwards the lops are suffered to grow above 20 years, no tithes are demandable of these lops: for they are timber. 1 *Rel.* 640. l. 7. *R.* 2 *Leo.* 79.

So, if oaks, &c. of above 20 years be topped or lopped usually within 20 years, no tithes are due for the tops and lops. *R.* 11 *Co.* 48. b. 1 *Rel.* 640. l. 15. *Semb.* 2 *Cro.* 100. *R. Cro. El.* 477, 8. *Mo.* 908. 762. *Godb.* 175.

Nor, for trunks of oaks, &c. after 20 years; tho' become rotten. 1 *Rel.* 640. l. 10. 11 *Co.* 49. a. 81. a.

Nor, for the germins of such timber-trees, which grow *de radicibus* & *stipitibus*, after the tree is cut down. 1 *Rel.* 640. l. 20. 11 *Co.* 48. b.

Nor, for the bark of such trees: for it is privileged in respect of the tree. 1 *Rel.* 640. l. 35. 11 *Co.* 49. a.

Nor, for a small quantity of underwood, put in faggots with the lops of oaks, &c. *R.* 2 *Leo.* 79. *Cro. El.* 347.

Nor, for roots, or stubs of trees, or underwood cut, for which tithes were paid; if they be rooted up before new germins grow. *R.* 1 *Rel.* 637. l. 35. *Mar.* 58. 64.

Nor, for the wood of fruit-trees, cut the same year in which tithe was paid for the fruit. 2 *Inst.* 621.

Nor, for wood used for fences. *R. Mo.* 917. 1 *Rel.* 644. l. 40. 2 *Inst.* 652.

Nor, for wood for burning of bricks for repairing the house of the parishioner. *Cod. Ju. Eccl.* 708. 1 *Rel.* 645. l. 10.

Nor, for dotards, used for fuel. *R. Mo.* 908.

Nor, for wood for necessities in the house, and for fences, by which the parson has *uberiores decimas*. 1 *Sid.* 447.

[No tithe shall be paid of hop-poles (*semb.* used by the grower). *Bate v. Spracking, H.* 1717, in *Sc. Bunb.* 20.]

Nor, for broom, furze, &c. used for firing in the house of the parishioner. *R. Cro. El.* 609. *Mo.* 909. 1 *Rel.* 644. l. 43.

Tithes of underwood shall be paid by him who cuts it.

So, tithes of a nursery of plants shall be paid by him who pulls them up. *R. Hard.* 380.

(H 5.) *Agistment of cattle.*] So, of common right, tithes shall be paid for the herbage, or agistment of barren cattle, which yield no profit to the parson. *Ca. Parl.* 192. *R. Sal.* 655. *R. Hard.* 184. *Cro. El.* 446. 475, 6.

The canon anno 1305 says, *quod de pasturis & pascuis tam communibus quam non communibus decimæ persolvantur secundum numerum animalium & dierum.* *Vide Cod. Ju. Eccl.* 693.

And tithes shall be paid for the pasture of all cattle not profitable to the parson. *Cod. Ju. Eccl.* 706.

A., if a parishioner buys cattle, which he depastures for sale. *R. Cro. El.* 475, 6. 1 *Rel.* 647. l. 5.

Tho'

Tho' they be beasts of the plough, or for milking; if the owner does not use them for such use, but pastures them for sale. *Cod. Ju. Eccl. 707.*

So, if he buys oxen, steers, or horses, and sells them when fatted. *1 Rol. 647. l. 17. 22. 29.*

Or, rears young cattle, and sells them. *1 Rol. 647. l. 25.*

[Tithe for yearlings. *Baker v. Sweet, in Sc. M. 1721, Bunb. 90.*]

So, if he uses them for the plough or pail covinously, and only for a colour.

So, beasts of the plough, which are disused for the plough and fatted for sale, ought to pay tithes for the time after they are disused. *R. Ca. Parl. 193.*

So, if an innkeeper depastures the horses of his guests. *R. Hard. 35.*

Or, any person depastures for hire. *R. Cro. El. 476.*

Or, sheep are fed upon turnips for sale after shearing; tho' tithes of the wool were paid. *R. Ca. Eq. 231, 2.*

So, if a man of another parish holds land in the parish of *B.* and there depastures cows, horses, or other cattle for plough and pail, but does not use them in the parish of *B.* *R. 5 Mod. 96. R. Hard. 184.*

So, if he uses part in part, he shall pay tithes for the residue. *5 Mod. 97.*

So, if a man agists cattle, part profitable and part unprofitable; he shall pay tithes for herbage of those which are unprofitable. *Cod. Ju. Eccl. 707. Popb. 197.*

Or, part with cattle for the plough, and part with the cattle of a stranger. *2 Rol. 191.*

If the owner of the soil agists the cattle, he pays the tithes. *Jon. 254. 1 Rol. 656. l. 15.*

If he lets the herbage, the lessee shall pay: for it ought to be paid by the occupier. *R. Hard. 35.*

[Tithes for depasturing unprofitable cattle shall be paid by the occupier of the ground, not by the agistor. *Underwood v. Gibbon, H. 1715, Foster v. Leman, 1720, in Sc. Bunb. 3.*]

[If the cattle be fed on a common, the suit must be against their owner; for the owner of the soil has no profit by it. *Ibid.*]

If all the herbage be taken by the cattle agisted, the tithe ought to be paid by the owner of the cattle: for he is the occupier. *R. Hard. 184.*

The sum paid for agistment shall be according to the usage of the place.

Sometimes the tenth part of the yearly value of the land. *Hard. 35. 184.*

Many times the twentieth part.

Or, the tenth part of the sum received for the agistment. *Cod. Ju. Eccl. 707.*

[Unprofitable cattle shall pay in proportion to the number of cattle, and value of the ground. *Smith v. Johnson, 1713, in Sc. Bunb. 1.*]

But no tithes are payable for the agistment, or herbage of cattle, which are profitable to the parson: as, for sheep for sale; for they pay tithes of their wool. *1 Rol. 647. l. 20.*

[If sheep are depastured in the parish three or four months after they

they have been shorn, and then removed into another parish, and shorn there; tithe of herbage shall not be paid for them. *H.* 1731, *Bunb.* 313.]

So, for oxen, steers, horses, &c. used for the plough in the same parish, for the parson has the profit of their labour in his tithes of the corn. *R. Hard* 184. 1 *Rol.* 646. l. 30. 45. *Win.* 33. 2 *Inst.* 651. *Vide Cro. Car.* 237.

[Vetches and clover cut, and given green to cattle used in husbandry, pay no tithes. *Semb. Hayes v. Dowse, H.* 1729, *Bunb.* 279.]

Nor, for cows, sheep, &c. used for the pail in the same parish: for the parson has tithes of their milk, &c. *R. Hard.* 184. 1 *Rol.* 646. l. 30. *Vide Cro. Car.* 237.

Nor, for cattle fatted for the victuals of the family of the owner in the same parish. 1 *Rol.* 647. l. 10. *R. Cro. Car.* 237.

Nor, for horses for the riding of the parishioner himself. *R.* 1 *Bul.* 171. *Adm. Poph.* 126.

So, no tithes are due for agistment of beasts *feræ naturæ*; as, deer, conies, &c. without special custom. *Vide post.* (*H.* 14. 16.)

Nor, for the skins of the cattle. 1 *Rol.* 646. l. 7.

Nor, for young cattle reared for the plough, or for the pail. 2 *Rol.* 646. l. 35. 40. *Mo.* 910. 2 *Inst.* 651.

So, no tithes are due for agistment when tithes are paid for hay of the same land in the same year. *R. Yel.* 86.

(*H.* 6.) *The young of cattle.*] So, of common right, tithes are payable of the young of animals.

As, of colts, kids;

Of calves, lambs, pigs, &c.

The manner of payment by the common law is generally conformable to the canon. *Semb. Cro. Car.* 403.

By a provincial canon anno 1305, *pro sex agnis & infra, sex oboli dentur pro decimâ; si septem sint agni, septimus detur pro decimâ rectori, qui tres obolos solvat parochiano. Si rector octavum recipit, det denarium; si nonum, det obolum, aut expectet ad alium annum, si maluerit; & tunc habeat secundum aut tertium agnum de agnis secundi anni. Vide Cod. Ju. Eccl.* 692. But this part which allows the waiting for his tithes to another year, is not agreeable to the common law, which requires an annual payment of tithes.

By another canon, *incerti temporis, agni, vituli, pulli, equini, & alii fetus decimales, decimentur habitatione ad loca ubi nutriuntur & oriuntur.*

[Tithe of lambs is not divisible, but must be paid where they fall.]

[If sheep are kept in *A.* all the year till *Christmas*, when they are ready to lamb, and then carried to defendant's own land in *B.* where there is a small *modus* for lambs, and there kept till *Lady-day* for convenience of forage, and then brought back to *A.*; this is not sufficient evidence of fraud. *Boys v. Ellis, M.* 1723, *Bunb.* 139.]

[*N. B.* Two barons thought at first that issue should be directed, to try fraud or not fraud.]

And the same manner usually prevails for tithes of calves, kids, pigs, &c. which the canon *supra* prescribes for lambs.

If the number be less than the canon mentions, the tenth part of the value is usually paid, unless where custom otherwise determines.

[The tithe of an odd number shall be paid according to the value, and

and not carried over to next year. *Egerton v. Still*, T. 1725, *Bunb.* 198.]

The time of payment is when the young is weaned, and can live without the dam; unless where custom prescribes a certain time or age.

[The general rule of tithing lambs is when they are capable of living without the dam. *Reignolds v. Vincent*, T. 1720, *Bunb.* 133.]

But, by custom, a man may be exempted for the young of cattle nursed for the pail or plough. *R. Cro. El.* 702. *Mo.* 910.

Payment of tithes for the young of animals ought to be by each owner severally.

Tho' the sheep of several are depastured together in one flock.

(H 7.) *Wool.*] So, tithes ought to be paid of the annual product of animals; as, of wool, milk, cheese, &c.

And it shall be of the wool, tho' the sheep die of the rot, or other disease.

Tho' the owner kills or sells his sheep. *Vide* 1 *Rol.* 646. l. 8.

Payment of tithes of wool shall be where the sheep are shorn, generally, and at the time of the shearing.

But a custom to pay at *Lammas* is good. *Mo.* 910. *Cro. El.* 702.

But by canon 1305, *si oves alibi æstate & alibi in hieme nutriuntur, dividenda est decima.* *Vide* *Cod. Jur. Eccl.* 692.

And *decima lane* shall be paid, as well as *de agnis, ubi sunt sex vel septem agni*, &c.

[Tithe shall be paid of the wool of lambs, tho' the lambs tithed two months before. *Baker v. Sweet*, in *Sc. M.* 1731, *Bunb.* 90.]

So, if sheep be sold a little time before shearing, into another parish; each parson shall have his proportion of the tithes. *Per Williams, Lane*, 16.

So, if wool be taken from sheep killed, tithes shall be paid for it. 1 *Rol.* 646. l. 7.

So, if cut from the necks to prevent flies, &c. without more. *R. Bul.* 242.

But no tithes shall be paid for wool to the parson of a parish, where the sheep were not 30 days.

So, where tithes are paid of the fleece, nothing shall be paid for the locks and belts. *Vide* 1 *Rol.* 646. l. 5.

Nor, for wool shorn from the neck about *Mich.* to prevent the sheep being caught in the briars. 2 *Rol.* 645. l. 45. 50.

Nor, for the birling of sheep, without fraud. 1 *Rol.* 645. l. 50.

(H 8.) *Milk.*] By the canon 1305, *de lacte decima solvetur in casis tempore suo, & in lacte in autumno & hieme; nisi parochiani velint redemptionem facere ad valorem decimæ.* *Cod. Jur. Eccl.* 692.

But by custom, sometimes it shall be paid *in specie*, throughout the whole year.

Sometimes cheese only shall be paid in lieu of tithes of milk. *Adm. Godb.* 329. *R. Cro. El.* 609. *Mo.* 909.

So, a custom to pay the tenth cheese made between the 1st of *May* and 1st of *August*, in lieu of all tithe of milk, is good. *R. Cro. El.* 609. *Mo.* 909.

Or, to deliver the tenth quart of milk at the parson's house. *Per Popph.* *Cro. El.* 609.

If no custom interferes, the milk shall be paid to the parson in kind. *Adm.* 2 *Brewinl.* 31.

And it is sufficient to deliver it where the tithe arises, without carrying it to the church, or the parson's house. *Cont. Ray. 278. Carth. 462. Cont. where paid in cheese. Semb. Ley. 70. (Vide Pal. 341. 381. 2 Rol. 328.)—Per Raymond, it shall be delivered at the parson's house; per three other Barons, at the church porch; and so decreed. Ray. 278.*

So, by a canon, *incerti temporis, decima lactis & casei de vaccis & capris ubi cubant & pascunt solvatur. Vide Cod. Jur. Eccl. 693.*

Si cubant in unâ parochiâ, & pascunt in aliâ, inter rectores dividatur. Vide Cod. Jur. Eccl. 693.

But where milk is paid in kind, there shall be no tithe of the cheese.

Or, for the time that tithes are paid of the cheese, there shall be none of the milk. *Vide 1 Rol. 651. l. 20. Cro. El. 609.*

Milk, where custom does not alter it, shall be paid at every tenth meal; not the tenth part of every meal. *R. Ray. 277.*

[Tithe milk ought to be paid by every tenth meal. *Bate v. Sprackling; H. 1717, Bunb. 20.*]

[The parishioner is, *de jure*, obliged to pay every tenth meal; to milk the cows at the usual place of milking into his own pails. The parson is obliged to fetch it away from the milking-place in his own pails, at a reasonable time; and if he does not before the next milking time, the parishioner may pour the milk on the ground. *Dodson v. Oliver, in Sc. P. 1721, Bunb. 73.*]

But a custom to pay the tenth meal for such a time, in lieu of all tithe of milk, is not good. *Cro. El. 609.*

Or, a meal of the ninth day at evening, and the tenth day in the morning, till an ewe has a lamb that bleats. *R. Sal. 656. Carth. 461.*

(H 9.) *The young of fowls.*] So, tithes ought to be paid of the young, or of the eggs of all tame and domestic fowls: as, of geese, ducks, swans, turkeys, hens, &c.; *cont.* of turkeys. *Mo. 599. But acc. as to turkeys, per Barons, M. 5 G. 2.*

So, of young pigeons in dove-cotes or holes, which are for sale. *R. 1 Rol. 635. l. 42. 644. l. 50.*

So, of honey and wax of bees in the hive. *R. 1 Rol. 635. l. 40. Cro. Car. 559. Jon. 447. Semb. so by custom. F. N. B. 51. G. Cod. Jur. Eccl. 707.*

Of geese, ducks, swans, the tithes are usually paid in the young, if custom does not otherwise determine.

Of turkeys and hens, in the eggs.

But no tithes are paid of the young where the eggs are paid; nor *contra.* *1 Rol. 642. l. 7.*

So, no tithes are paid of animals, or fowls, which are *fera natura*, without a special custom. *Vide post. (H 14. 16.)*

Nor, of the young or eggs of pheasants or other fowls, which are kept near the house by the clipping of their wings: for they are not reclaimed. *R. 1 Rol. 636. l. 10. Mo. 599.*

Nor, of pigeons in a dove-cote, used for the family, without a custom. *R. 1 Rol. 642. l. 43. 644. l. 45. 52.*

Nor, of bees, where a custom is alleged, that by tithes of the wax and honey, and the charge of hives, and maintaining them in winter, he ought to be discharged. *Cro. Car. 403, 4. 1 Rol. 651. l. 5.*

So, by some, without such allegation: for they are *ferè natura*.
1 *Rel.* 651. l. 5.

(H 10.) *Fruits, seeds, roots, &c.* When they shall be paid, and how.] So, of common right, tithes are payable of all fruits and plants which renew yearly: as, of apples, pears, plumbs, and other fruits in orchards, or gardens. *Vide* 2 *Inst.* 652.

By the canon *Rob. Winchelsey* 1305, *decimæ solvantur de fructibus arborum, seminibus omnibus, & herbis hortorum, nisi parochiani competentem redemptionem fecerint pro talibus decimis.* *Vide* *Cod. Jur. Eccl.* 692.

So, of crabs, mast, &c.

[Of black cherries, tho' they grow wild in hedges and waste places, and serve for fencing the ground. *Chapman v. Barlow*, *M.* 1724, *Bunb.* 183.]

So, of all seeds of hemp, flax, herbs, &c. if tithes were not paid of the hemp, flax, &c. itself.

So, of acorns if they are gathered and sold. *Het.* 27. *Cod. Ju. Eccl.* says, of acorns, generally, 706. So, 11 *Co.* 49. a.

So, of all roots; as, turnips, carrots, parsnips, &c.

So, for pease, beans, &c. for sale, or the feeding of hogs. 1 *Rel.* 647. l. 15.

So, of all herbs.

And tithes of fruits, roots, and herbs, ought to be paid when they are gathered; or some rate for them.

Tho' the owner permits another to gather them. *Cod. Ju. Eccl.* 707.

[Of turnips, tho' sown after the corn is cleared, and fed with sheep and barren cattle, and plaintiff has received tithe of lambs and wool before. *Swinfen v. Digby*, *H.* 1731, *Bunb.* 314.]

[By *stat.* 31 *G.* 2. c. 12. tithe of madder is settled at 5 s. per acre.]

(H 11.) *When not.*] But tithes shall not be paid of feed, when it was paid of the herbs or plants themselves; nor *è contra*.

Nor, for acorns which fall from the oak, and are gathered and eaten by hogs. *Het.* 27.

So, tithe shall not be paid for fruit stolen; for it is not due till it be gathered by the owner, or with his consent. *Cod. Jur. Eccl.* 707.

(H 12.) *Mills.*] So, for a mill, antient or new, some tithes are due. 2 *Inst.* 621.

And by *Art. Cleri.* 9 *Ed.* 2. 5. where a prohibition for tithes of a new mill was prayed to be allowed, it was denied; and decreed, that such prohibition never should be granted.

And this act extends to all mills, public or private, as a fulling, paper, iron mill, &c. as well as a corn-mill. 2 *Inst.* 621.

By the Canon *Rob. Winchelsey*, arch. Cant. an. 1305, *de proventus molendorum decimæ fideliter & integre solvantur, viz. decimæ granorum molitorum ad molendinarium pertinentium, tanquam fructuum prædialium, expensis non deductis.* *Lind.* 195. *Vide* *Cod. Jur. Eccl.* 692, 3.

So, where by usage the tenth toll-dish has been paid, it shall be good, tho' it be a predial tithe, and not a personal. 2 *Inst.* 621.

[An ancient corn-mill ought to pay the tenth toll-dish, which being a tenth part of the thing itself, is a predial tithe, and due of common right.]

right. *Per Price B. and Montague B. Contra, per Bury C. B. and Page B.* It is a personal tithe, and not due of common right; and (*this*) not having paid, is now exempt by *st. 2 & 3 Ed. 6. Dodson v. Oliver, in Sc. P. 1721, Bunb. 73.*

And the tenth toll-dish seems the proper payment of tithes of a corn-mill. *Cont. 2 Inst. 621. Acc. 1 Rol. 656. l. 35. 2 Rol. 84. Per Holt, Sho. 281.*

So, by prescription, a *modus* may be paid for an antient mill. *Sho. 281. 4 Mod. 45.*

But tithes for a fulling, paper, iron mill, &c. are properly a personal tithe: for no tithes in kind are due. *2 Inst. 621. 1 Rol. 641. l. 15. 656. l. 34. 1 Rol. 405. Semb. 2 Rol. 84. 2 Cro. 523. Cont. Semb. 1 Rol. 641. l. 20. Vide ante, (F 3.)*

So, for a copper-mill. *Lit. 314.*

So, for a tin-mill, lead-mill, &c. *2 Rol. 84.*

So, for a glass-house, &c. *Lit. 314.*

And if but a personal tithe, then where no tithes are used to be paid, none are due. *Vide st. 2 & 3 Ed. 6. 13. 2 Rol. 84. 1 Rol. 405. 3 Bul. 212.*

So, an antient grist-mill may be discharged from payment of tithes by prescription.

So, if a mill is erected *de novo* upon land discharged of tithes by payment of a *modus*; the mill shall not pay tithes, but the antient *modus*. *R. 1 Rol. 651. l. 30. 2 Inst. 490.*

So, if a *modus* be for two mills, and the water-course being diverted by the act of God, one mill is removed to the water-course; no tithes, but the antient *modus*, shall be paid. *R. 1 Rol. 652. l. 10.*

Yet if a mill be erected *de novo* upon land discharged by the *st. 31 H. 3. 13.* it shall pay tithes. *R. 2 Cro. 429.*

So if a *modus* be for a house and mill, and another mill is newly erected within the house; it shall pay tithes: for it is not merely a predial, but in part a personal tithe. *Semb. 1 Rol. 652. l. 25.*

So, if a *modus* be for two mills, and the stream is diverted by the act of the party, and one mill is removed to it; it shall pay tithe. *R. 1 Rol. 652. l. 20.*

So, if tithe is payable at the mill, it shall not be paid for corn, for which tithe was paid the same year to the same parson. *2 Inst. 652.*

[If there is an ancient mill under a building, worked with one wheel, and the owner under the same roof erects two new wheels, and two new pair of stones, they are to all intents two mills, and cannot be recovered by the same *modus*. *Talbot v. May, M. 1743, 3 Atkyns, 17.*]

[If there are two ancient mills in one parish paying tithes, and the owner of a fulling-mill covered with a *modus* turns it into a corn-mill, it shall pay tithe. *Ibid.*]

[Where two pair of stones are erected instead of one, a *modus* is destroyed, because the miller can grind double quantity. *Ibid.*]

[If there were two fulling-mills and a corn-mill under the same roof, and the fulling-mills are turned into corn-mills, it is the same as if two new mills were erected. *Ibid.*]

[Fulling-mills only pay personal tithes. *Ibid.*]

[Corn-mills pay the tenth dish. *Ibid.*]

(H 13.) *Tithes for hemp, flax, &c. ascertained.*] So, by *fl.* 3 *W. & M.* 3. revived by 11 & 12 *W.* 3. 16. and continued for seven years, every acre of land not discharged by *modus*, and sown with hemp or flax, shall pay 5*s.* and no more for tithes, and so proportionably, &c. —Continued by other acts, and made perpetual by 1 *Geo.* *fl.* 2. c. 26.

(H 14.) Of what Things Tithes are not payable, of Common Right.

But no tithes are payable, of common right, for a house of habitation: for tithes are paid for things annually renewing by the act of God. 11 *Co.* 16. a. 1 *Rol.* 636. l. 40. *Hob.* 11. *Vide Cro. El.* 276.

Nor, for rent reserved upon a house or land. 11 *Co.* 16. a. 1 *Rol.* 636. l. 43.

Nor, for profit made by sale of a house. *R.* 1 *Rol.* 656. l. 55.

So, of common right, tithes are not payable for things parcel of the freehold: as, for quarries of stone, &c. 1 *Rol.* 637. l. 5. *R. Cro. El.* 277. *Mo.* 908. 2 *Inst.* 651. *Seld.* 3 vol. 1201. 2 *Leo.* 79.

Or, for coals. 1 *Rol.* 637. l. 7. 2 *Leo.* 79. 2 *Inst.* 651.

Or, tin. 1 *Rol.* 637. l. 12. 2 *Inst.* 651.

Or, for lime, or chalk. *R.* 1 *Rol.* 637. l. 17. *Het.* 14. 2 *Inst.* 651.

Or, for lead, copper, or other ore. 2 *Ver.* 46. *Het.* 14. 2 *Inst.* 651.

Or, for gravel, or clay.

Or, for brick, or tile, &c. *R.* 2 *Mod.* 77. 2 *Inst.* 651.

Or, for turf used for fire. *R.* 1 *Rol.* 637. l. 10. 2 *Inst.* 651.

Or, for flags, marl, chalk. 2 *Inst.* 651.

So, no tithes are due, of common right, of things which are *feræ naturæ*: as, of deer in a park. 2 *Rol.* 458. 2 *Inst.* 651.

Nor, of conies. *R.* 1 *Rol.* 635. l. 45. *Per two J. Lit.* 13. *Hard.* 188. *Semb.* 2 *Rol.* 458.

Nor, for fish taken in the high sea: for there is only a personal tithe due, *deductis expensis*. *R.* 1 *Rol.* 636. l. 20. *Cro. Car.* 264. *Vide post.* (H 16.)

Nor, for fish taken in a common river. *R.* 1 *Rol.* 636. l. 5. 25. *Cro. Car.* 339. *R. Het.* 13.

Nor, for doves or pigeons. 2 *Mod.* 77. — *Per cur. cont.* 2 *Rol.* 2. 1 *Rol.* 635. l. 42.; but this seems intended by custom, for they are not due of common right, where consumed in the house of the owner. *Per cur.* 1 *Rol.* 642. l. 43. 644. l. 45. *R. Lit.* 311. *Het.* 27. 147.

Tho' the owner has no dove-cote, but pigeon-holes fastened to his house. 1 *Rol.* 644. l. 52.

Yet if the owner sells his young pigeons, tithes are due. 1 *Rol.* 644. l. 50. *Per Hendon, Lit.* 311. *Het.* 147. *Vide ante,* (H 9.)

So, tithes are not paid of dogs, cats, &c. 12 *H.* 8. 4. b.

[Of headlands only large enough to turn the plough upon. *Chapman v. Barlow, M.* 1724, *Bunb.* 183.]

(H 15.) What are exempted for seven Years.

So, by *fl.* 2 & 3 *Ed.* 6. 13. all barren heath or waste ground (not otherwise discharged) which paid no tithe by reason of its barrenness, if improved, shall pay tithes after seven years after its improvement.

And therefore, such barren and sterile lands are exempted from tithes for seven years. 2 *Inst.* 655, 656.

So,

So, by the same stat. if they paid any tithes, till seven years after improvement they shall pay no other tithe than before.

And if it be barren as to tillage, and be afterwards improved for tillage, it shall be exempted for seven years; tho' it paid tithes of lambs and wool before. 2 *Inst.* 655, 656. *Cont. Het.* 147.

So, heath, or land which only produces a flower in autumn upon which the cattle and sheep brouse, or flags, or turf for fuel. 2 *Inst.* 656.

But the lands excused are such as are barren in their nature, and not by bad husbandry. *R. Mo.* 909. *Cro. El.* 475. *Vide* 2 *Inst.* 656.

And therefore, fenny land shall not be excused, tho' it be drained. *Mo.* 430. 3 *Bul.* 166.

[If land, after being grubbed up, will produce nothing without being dunged or chalked, it is within the statute; if it will produce one crop with only ploughing, it is not. *Stockwell v. Terry*, *T.* 1748, 1 *Vesey*, 115.]

[Nor, wood-lands grubbed, and afterwards sown with corn, or grafs. *Bend.* 80. 2 *Inst.* 656. *Beardmore v. Gilbert*, *H.* 1723, *Bunb.* 159.]

Nor, land overgrown with thorns and bushes, tho' it be cleared by industry. *R. Cro. El.* 475. 2 *Inst.* 656.

Nor, a salt-marsh; tho' by a great charge, enclosed or recovered from the sea. *R.* 3 *Bul.* 166.

Nor, a marsh surrounded, for want of cleansing the sewers or ditches, or by accident, or inundation, when afterwards recovered. 2 *Inst.* 656.

So, lands, enclosed with hedge and ditch, are not exempted, as waste, or heath. *Bend.* 80.

(H 16.) Of what Things Tithes are due by Custom.

Yet, by custom or prescription, tithes may be due for rent of houses in an antient city or borough. *R.* 11 *Co.* 16. *a.* *Qu.* 1 *Rol.* 642. *l.* 30. *Adm.* by a proviso in the *st.* 2 & 3 *Ed.* 6. 13. *S.* 12.

But this does not extend to a house newly erected. 1 *Rol.* 642. *l.* 35.

[Houses in *St. Saviour's Southwark*. *Pocock v. Titmarsh*, *H.* 1721, *Bunb.* 102.]

So, by custom, tithes may be due for things which are parcel of the freehold; as, for a lime-kiln. 1 *Rol.* 642. *l.* 50. *Het.* 14.

For salt. 1 *Rol.* 642. *l.* 52.

For iron-ore, or lead-ore. *Het.* 13, 14.

So, by custom, they may be due for things *feræ naturæ*: as, for fish taken in a river, or the sea. *Semb.* 1 *Rol.* 636. *l.* 20. *R. Cro. Car.* 264. *Cro. Car.* 339. *Adm. by the st.* 2 & 3 *Ed.* 6. 13. *S.* 11. *Pal.* 527. *Het.* 13.

[Of fish taken in the adjoining seas by occupiers of fishing net or craft kept in the parish, by parishioners or others. *Guavas v. Kelynac*, *M.* 1728. On trial at bar; and affirmed, on appeal to the Lords. *Bunb.* 256.]

[A double tithe may be payable (as of fish); one may be due by custom, and another of common right. *Earl of Scarborough v. Hunter*, in *Sc.* *P.* 1719, *Bunb.* 43.]

For conies, 1 *Rol.* 635. *l.* 50. *Lit.* 13. *Hard.* 188. 1 *Vent.* 5. *Het.* 13.

So, for doves or pigeons. 1 *Rol.* 642. l. 43. 644. l. 34. 1 *Vent.* 5.
And where tithes are not due by the common law, but only by prescription, the parishioner may prescribe to pay the twentieth fish, &c. or other share in lieu of the tithe. 1 *Lev.* 179.

So, for great trees. 1 *Rol.* 642. l. 38.

Or, for wood cut to be consumed in the house of the owner. 1 *Rol.* 642. l. 46.

So, a man may prescribe for tithes of some things for which no tithes are due of common right: as, by the custom in *Wales*, for tithes of goods given in marriage; but this is now taken away by the *st.* 2 & 3 *Ed.* 6. 13. 2 *Inst.* 664.

(I) The Manner of Payment.

(I 1.) They ought to be severed from the Nine Parts.

HOW tithes of corn, hay, and wood, shall be paid, *vide ante*, (H 1, 2, 3, 4. 10. 12, 13.)

[The tithe must be set out before the farmer remove his nine parts; therefore he may not throw nine sheaves into the cart, and leave the tenth for the tithe. *Boughton, Rector of Barrow in Suffolk, v. Wright, H.* 1724, *Bunb.* 186. N. B. This is called tithing by the fork in that neighbourhood, and is a very fraudulent method of tithing, being in effect tithing *absque visu & tactu*.]

How agistment, or increase of cattle and poultry, *vide ante*, (H 5, 6, 7, 8, 9.)

[Tithes of hops are not to be paid till after they are picked, and before they are dried, every tenth measure. *Chitty v. Reeve, in Sc. T.* 3 *Jac.* 11. *Bliss v. Chandler, in Sc. M.* 1720, *Bunb.* 20.]

[The manner of tithing hops was finally settled by decree in *Scac.* confirmed on appeal to the lords in *Walton v. Tyers, anno G. 2. quod vide.* 5 *Bro. P. C.* 99. *Knight v. Halfey, B. R. H.* 37 *Geo.* 3. 7 *T. R.* 86.]

[A custom to set out the tithe of hops by the tenth hill, where the rows are unequal, leaving the binds uncut and the poles standing, cannot be supported. *Ibid.*]

By the *st.* 2 & 3 *Ed.* 6. 13. every subject shall justly, without guile, set out, divide, and pay all manner of predial tithes, in such manner as hath been of right used for 40 years past.

And therefore, if he does not sever the tenth from the nine parts, it is within the statute.

Or, if he severs, and afterwards carries the tithes severed; for this is a fraudulent severance. 2 *Inst.* 649.

Or, grants the tithes, before severance, to *A.*, and immediately after severance *A.* carries them away. 2 *Inst.* 649.

So, by *st.* 2 & 3 *Ed.* 6. 13. at the tithing of predial tithes, it shall be lawful for any to whom tithes are due, or his servant, to see his tithes truly set forth, and severed from the nine parts, and the same to take and carry away.

And therefore, a custom that tithes shall be set out *absque visu & tactu* of the parson, is not good. 2 *Vent.* 49. *R. Hob.* 107.

(I 2.)

(I 2.) But there needs no Notice of the Severance.

But notice need not be given when tithes are set out, tho' it is required by the ecclesiastical law. *R. 2 Vent. 48. Acc. Carth. 143. Per Hutton, Noy, 19.*

So, if there be two impropriators, he need not divide his tithes into moieties when they are severed. *Latch, 24. 228.*

Yet before an action on the case is brought for not carrying away his tithes, notice of the severance shall be given. *Vide post. (L 3.)*

[Notice of severance is not by common law necessary even to support action on the case for not fetching them away in time; but a custom to give notice is good, and slight evidence will support such custom. *Butter v. Heathby, P. 6 G. 3. 3 B. M. 1891.*]

(K) Tithes belong to the Successor from the Death, &c. of the last Incumbent.

BY the *st. 28 H. 8. 11.* the tithes, fruits, oblations, &c. rents, and all profits belonging to any archdeaconry, parsonage, &c. or other spiritual promotion, &c. arising during vacation, shall belong to the person next presented, promoted, instituted, &c.

And if any ordinary, or any other, take them and refuse to render them to the next incumbent, or hinder his taking, &c. he shall forfeit treble the value, &c.; a moiety to the king, a moiety to the next incumbent, save the charge of the cure and collecting the tithes, &c.

And therefore, the tithes belong to the successor from the death of the former incumbent; tho' another officiates for 10 years before the successor be instituted and inducted. *R. Hard. 329.*

But by the *st. 28 H. 8. 11.* the executor of the former incumbent shall have the corn of the glebe sown by his testator.

If the testator makes a lease, rendring rent payable at *Lady-day* and *Michaelmas*, and dies after all the profits of the year received, but before *Michaelmas*, the next incumbent shall not have a bill for the rent due at *Michaelmas*, without making the executor a party. *2 Ver. 136. 204.*

[Sequestrator alone cannot sue for tithes. *Berwick v. Swanton, T. 1692, Bunb. 192.*]

[If the incumbent sue the sequestrator, the bishop must be made a party. *Jones v. Barret, H. 1724, Bunb. 192.*]

(L 1.) When Tithes shall not be paid.

BUT by *st. 2 & 3 Ed. 6. 13.* no person shall be sued for, or pay any tithes for any lands, &c. which by the laws and statutes of this realm, or by privilege or prescription are not chargeable, or are discharged by real composition. *Vide ante, (E 1, &c.)*

(L 2.) A Parson shall not have Tithes during a Lease, or Composition for them.

If a parson leases his tithes to another, he cannot afterwards demand tithes of his parishioner during the lease. *Vide ante, (E 21.)*

So, if he leases or makes a composition or agreement with any parishioner for his own tithes. *R. 1 Lev. 24.*

Tho' it be an agreement by *parol* for the life of the parishioner, if the plaintiff so long continues parson. *R. per tot. cur. 1 Lev. 24.*

But an agreement by a parson with a parishioner, to take a composition of so much as long as he continues parson, binds only at will, if it be by *parol*. *R. Hard. 203.*

So, a lease of tithes above a year shall not be good by *parol*. *Godb. 354. Ow. 103.*

Nor, any lease to a stranger, tho' it be but for a year. *R. Godb. 374. Latch, 176.*

[A composition, by way of retainer, by *parol*, is good only for one year; a lease of tithes by *parol*, even for one year, is void. *Hed. dington v. Bridgeman, 1715, in Sc. Bunb. 2.*]

So, a covenant by a parson, that his parishioner shall not pay tithes, and by the parishioner, to pay so much for a year, shall be no discharge of a suit for tithes: for it rests in covenant. *Popb. 140. 2 Lev. 73.*

Yet such a composition by *parol* excuses the parishioner from damages upon the *st. 2 Ed. 6. 13.* so long as the parishioner has no notice that the parson will determine it. *R. Hard. 203.*

So, if the parson sues in the ecclesiastical court after such a composition, a prohibition goes. *Godb. 333.*

So, if a composition for so much *per annum* be made *quamdiu placuerit*, the parson cannot determine his composition after the corn sown. *Per Hale, Sal. 414. Hard. 203.*

[It is time enough to give notice, to determine a composition before reaping the corn, or picking the hops, but not after. *Per Price B. Bund. 15. Sed qu.*]

Neither shall he avoid it for the time passed, by notice to determine it after the day of payment incurred. *Hard. 203.*

[A composition cannot be determined as to part, and continued as to the rest. *Reynel v. Rogers, T. 1717, in Sc. Bunb. 15.*]

(L 3.) He ought to take them away within a reasonable Time.

When the tithes are severed from the nine parts, the parson ought to watch them till he carries them away; not the owner of the land, &c. *Noy, 31.*

If the parson does not take away his tithes within a reasonable time, but suffers them after severance to continue upon the land to the damage of the parishioner, an action upon the case lies by him against the parson. *Pal. 341. 381. Noy, 31.*

So, if the parson will not take his tithe-cheefe after notice to take it. *Semb. God. 330. 332. R. per three J. Pal. 341. 381. Noy, 31.*

So, a parishioner may distrain tithes as *damage-feasant*, which continue upon his land for an unreasonable time, to his damage. *Semb. 3 Bul. 336.*

But before an action upon the case against the parson, notice of the severance ought to be given to him. (*Vide 2 Vent. 48. & 1 Rol. 643. l. 38. Qu. if not Semb. cont.*)

So, the parishioner ought to shew how long the tithes continued upon his land after notice. So,

So, a tender of the tithe-cheese ought to be made, before an action is maintainable for not taking it. *R. per two J. Pal.* 382.

So, if the owner takes tithes severed *damage-feasant*, he ought to shew that the tithes continued a long time upon the land. *R. 3 Bul.* 336.

[Though the proprietor of tithes does not remove them in a convenient time, the owner of the land cannot put in his cattle and depasture them. *Shapcott v. Mugford*, *C. P. E.* 8 & 9 *W.* 3. 1 *Ld. Raym.* 187. *Williams v. Ladner*, *B. R. M.* 39 *Geo.* 3, 8 *T. R.* 72.]

(M) Remedy for Tithes.

(M 1.) In the Ecclesiastical Court.

(M 1.) *By spoliation.*] **R**EMEDY for tithes lies in the spiritual, or temporal court. The remedy in the spiritual court is either for the right, or the detaining of tithes.

In all cases, where the right of presentation does not come in question, a spoliation may be sued in the spiritual court for the church itself, or for the profits of the church, by one incumbent against another. *F. N. B.* 37. 51.

As, if an incumbent be created bishop and holds his church *in commendam*, and another be instituted and inducted; spoliation lies by the one against the other, for the tithes and profits of the church. *F. N. B.* 36. *H.*

So, if the incumbent accepts a plurality, and another is afterwards instituted and inducted. *F. N. B.* 36. *H.*

So, if a bishop collates to a prebend, and dies, and the prebendary is inducted, and then the king collates another, who is inducted; spoliation lies by one against the other: for the right of patronage is not in debate, the king's clerk not having title till the other be removed by *quare impedit*. *F. N. B.* 36. *K.*

So, if a clerk has a church by provision contrary to the *fl.* 25 *Ed.* 3. upon which the king presents one who takes the profits before induction: for the king's presentee, not being inducted, is a trespasser. *F. N. B.* 37. *C.*

So, if one clerk claims the tithes as parson, the other as vicar to the same church, spoliation lies.

If one claims as parson, the other a portion of tithes of the same church due to him by prescription. 1 *Leo.* 58, 59.

So, spoliation lies by a farmer, &c. of a parson, against another parson, or his farmer.

So, one clerk may have spoliation against the other, if the tithes do not amount to the fourth part of the value of the church, tho' claimed by several tithes; in which case the right of patronage may come into debate. *F. N. B.* 37. *E.*

When spoliation lies, the suit cannot be stayed by prohibition, or *indicavit*. *Vide Prohibition*, (G 5, &c.)

And if trespass, or other action at the common law, be sued for such tithes, the other clerk may plead to the jurisdiction of the court.

But spoliation does not lie by one clerk against another, who claims as incumbent of another church.

Or, by the presentation of another patron to the same church. *F. N. B.* 36. *H.*

So,

So, if an abbot claims as an appropriation to his house, the other by the presentation of a stranger. *F. N. B.* 37. *B.*

Or, by the presentation of the lessee of the same abbot. *F. N. B.* 37. *A.*

So, spoliation does not lie against a clerk, who has not a title by the ecclesiastical law: as, if he takes the profits of a church without presentation, institution, and induction. *F. N. B.* 36. *H. I.* 37. *C. D.*

So, it does not lie, where tithes are demanded by a clerk against another claiming by a several title, to the value of the fourth part of the church, or above. *Vide F. N. B.* 37. *E.*

(M 2.) *By libel.* In what cases a suit by libel shall be in the spiritual court.] Remedy for substraſtion of tithes, in the spiritual court, began originally by act of parliament. 2 *Inst.* 489. *Vide Prohibition,* (G 5.)

But it was antiently allowed. 2 *Inst.* 364. 2 *Roll.* 217. l. 5. *Seld. of Tithes,* c. 14.

By the *ſt. Circumſpecte agatis*, 13 *Ed.* 1. *ſi rector petat verſus parochianos oblationes aut decimas debitas vel conſuetas, vel ſi rector agat contra rector. de decimis, modo non petatur quarta pars valoris eccleſie, habet iudex eccleſiaſticus cognoscere.* — And by *art. cleri*, 9 *Ed.* 2. 1. no prohibition ſhall go. 2 *Inst.* 487. 619.

By the *ſt.* 1 *R.* 2. 13. ſuch who by indictment, imprisonment, &c. endeavour to ouſt the juřiſdiction of the ſpiritual court in ſuch ſuits, &c. incur the penalty againſt falſe appeals.

By the *ſt.* 27 *H.* 8. 20. and 32 *H.* 8. 7. every ſubject, &c. ſhall pay his tithes according to the eccleſiaſtical laws and cuſtom of the pariſh; and for ſubſtraſtion, &c. any perſon eccleſiaſtical, or lay, may convent the offender, &c. before the ordinary, &c. and compel him to yield his dues.

By the *ſt.* 2 & 3 *Ed.* 6. 13. if any carry away, &c. his predial tithes before they be ſet out, on proof before the ſpiritual judge or other judge, &c. he ſhall pay double the value beſides coſts, to be recovered before the eccleſiaſtical judge, according to the eccleſiaſtical laws.

And by the proviſoes in the *ſt.* 32 *H.* 8. 7. and 2 & 3 *Ed.* 6. 13. if any ſubſtraſt tithes, &c. he ſhall be ſued in the eccleſiaſtical court to the intent the eccleſiaſtical judge may hear and determine the ſame: and it ſhall not be lawful for any to ſue, &c. before any other judge than the eccleſiaſtical.

But by a proviſo the ſtatutes do not extend to theſe citizens of London. *Vide poſt.* (M 6, 7.)

And by a proviſo in the *ſt.* 2 & 3 *Ed.* 6. 13. that act does not extend to give juřiſdiction to the eccleſiaſtical judge to hold plea againſt the effect of *W.* 2. 5 *Art. Cleri. circ. Agatis Silva cadua*, the treatiſe *De Regia Prohibitione*, the *ſt.* 1 *Ed.* 3. 10. or in any matter where the king's court ought to have juřiſdiction.

And therefore, in all caſes of ſubſtraſtion of tithes due, the proprietor, eccleſiaſtical or lay, may ſue for the ſingle value in the eccleſiaſtical court. 2 *Inst.* 490. *R.* 3 *Bul.* 271.

And for the double value, where predial tithes are detained. *Goulb.* 245.

And ſhall recover the tithes themſelves, as well as the double value, and his coſts. *R.* 2 *Inst.* 612. 615. A ſuit

A suit may be in the spiritual court, tho' the tithes are severed and afterwards substracted, &c. by the owner. *Cro. El.* 843, 4.

Tho' the actor there claims by a lease of the tithes by *parol*: for the defendant ought to set forth his tithes. *R. 1 Leo.* 23.

By the *st.* 27 *H. 8.* 20. every defendant to a suit in the ecclesiastical court may have his lawful demand, prosecution, appeal, prohibition, or other lawful defence, or remedy, according to the ecclesiastical laws and statutes of this realm.

(M 3.) *By what means payment shall be compelled there.*] By the Canon *Ro. Winchelsey* 1305, *parochiani moneantur 1^o, 2^o, 3^o, ut decimas fideliter solvant; & si non emendaverint, 1^o, ab ingressu ecclesie suspendantur; & sic demum ad solvendum per censuram ecclesiasticam, si necesse sit, compellantur. Vide Cod. Ju. Eccl.* 693.

(M 4.) *When it shall have the aid of justices of peace.*] By the *stat.* 27 *H. 8.* 20. in case the ordinary, &c. for any contempt of the defendant, &c. make information and request to any of the king's council, or to justices of peace where the offender dwells, to assist the ordinary, &c. or reform the defendant in any such cause, such king's council or two justices (*quorum unus*) shall attach such defendant, and commit him to ward without bail, &c. till he find surety before him, or some other counsellor, or justice, by recognizance, &c. to the king, to give obedience to the process, and decree of such ecclesiastical court.

So, by the *st.* 32 *H. 8.* 7. if he refuse after sentence, &c. two justices (*quorum unus*) on certificate, or complaint of the ecclesiastical judge, may attach and commit to the next gaol, till he find surety, &c. to perform the sentence.

And by the *st.* 2 & 3 *Ed. 6.* 13. the ecclesiastical judge, if he obey not the sentence, &c. and no appeal, or prohibition be pending, may excommunicate him; and in case he continues so 40 days after publication of it in the parish-church where he dwells, may signify it to the *Chancery*, and pray process of *excommunicato capiendo*.

By the *st.* 27 *H. 8.* 20. before sentence, on certificate of contumacy, two justices of peace may commit, &c. — But they cannot proceed upon the *st.* 32 *H. 8.* or 2 & 3 *Ed. 6.* till sentence is passed.

And by these statutes in all suits for tithes, oblations, &c. due by usage, where only the single value is demanded, the ordinary may have the aid of justices of peace.

The justices may take surety by recognizance, or obligation to the king.

And upon the *st.* 32 *H. 8.* they ought to take two sureties; but upon the *st.* 27 *H. 8.* one is sufficient.

But justices of peace cannot commit, &c. except where the defendant is obstinate.

Neither can they commit before sentence, where the suit is by a lay person.

If a commitment be irregularly made, an *habeas corpus* lies. *Cart.* 221.

[There need be no oath to ground the commitment, the certificate is sufficient. Tithes and other rights good, tithes or other, bad. Certificate of the vicar-general need not recite that the bishop was out of the

the dioceſe, nor need the juſtices convene the defendant before them.
R. v. Owen, T. 7 G. 3. 4 B. M. 2095.]
Vide Juſtices of Peace, (B 34.)

(M 5.) In the Temporal Courts.

(M 5.) *In the hundred or county-court.]* Remedy for ſubſtraction of tithes in the temporal courts, may be purſued in the hundred, or county-court, before the mayor of London, in the courts of *Westminſter*, or a court of equity.

Antiently a ſuit for tithes was allowed in the county-court. *Seld. de Dec. c. 14.*

In the ſheriff's tourn. *2 Inſt. 661.*

So, in the hundred court.

(M 6.) *Before the mayor of London. When tithes are paid in London.]*
 By *ſt. 37 H. 8. 12. ſect. 2. 11.* a decree is confirmed by which it was directed, that the inhabitants of London and liberties ſhall pay tithes to the parſons, vicars, and curates of the city according to the rate of *16 d. ob.* for every *10 s. per ann.* of all houſes, ſhops, ware-houſes, cellars, and ſtables in the city or liberties, and *2 s. 9 d.* for every *20 s. rent, &c.* by quarterly payments. *Ca. Eq. 192. Seld. 3 vol. 1202.*

By *ſ. 3, 4.* if by fraud leſs rent be reſerved, and a fine, &c. taken, the tenant ſhall pay tithes according to the rent when laſt let, without fraud: and if the owner occupy it himſelf, he ſhall pay according to the rent when laſt let.

By *ſ. 6.* if a leſſee make an under-leaf of part, each ſhall pay according to his rent.

By *ſ. 13.* if he lets it in parcels under *10 s. per ann.* the owner, if he dwells in part of it, or elſe the principal leſſee, ſhall pay after the rate the houſe let at; and the tenants of ſuch ſmall parcels ſhall be diſcharged, paying *2 d.* a-piece for offerings.

So, tithes ſhall be paid for a houſe according to the rent upon the former demife, tho' no rent be reſerved, nor fine paid. *2 Inſt. 660.*

Tho' the rent be reſerved for half a year, and afterwards for another half year.

Tho' the houſe was before diſcharged by the *ſt. 31 H. 8.* or otherwiſe. *R. Cro. El. 276. Mo. 912.*

But by the ſame decree, *ſ. 14.* no tithes ſhall be paid for gardens of pleaſure, nor let out to profit.

Nor, by *ſ. 16.* noblemen's or great men's houſes while unlet, if they did not formerly pay tithes.

Nor, by *ſ. 16.* for halls of crafts or companies, not uſing to pay tithes, while unlet.

Nor, by *ſ. 17.* for ſheds, ſtables, cellars, timber-yards, or tenter yards, never belonging to a dwelling-houſe, and not uſing to pay tithes.

And, by the ſame decree, *ſ. 18.* where leſs than *2 s. 9 d.* for every *20 s.* hath been accuſtomed, the inhabitants ſhall pay only the rate accuſtomed.—Tho' the leſſer ſum was paid by uſual agreement, or aſſent, and not by preſcription. *R. per three Barons, 12 Geo. 1. Ca. Eq. 193.*

Or, by *ſ. 21.* if a tenement be let at leſs by reaſon of its ruins, the tithes ſhall be only at the rate it is let at. And,

And, by *f. 12.* an householder paying *10 s. per ann.* or more, shall pay nothing for offerings; but his wife, children, servants, &c. shall pay *2 d.* yearly.

So, by construction upon this statute and decree, if the rent be reserved which was paid at the time of the decree; it shall not be a fraud if the lessee by covenant be bound to pay more annually as a fine. *2 Inst. 659.*

So, tithes shall not be paid for an house, which never was demised, but occupied by the owner: for it is *casus omisus*. *2 Inst. 660.*

So, an impropiator cannot sue for tithes upon this decree: for he is not within the statute, which names the parson, vicar, and curate only. *Hard. 102.*

Nor, a sequestrator by ordinance of parliament. *Dub. Hard. 102. Cro. Car. 596.*

(M 7.) *How recovered.*] By *f. 37 H. 8. 12. f. 19.* (which confirms the decree for tithes in *London*) it is enacted, that if variance arise in the city for non-payment of tithes, or upon the knowledge of the rent or tithes, &c. on complaint by the party grieved to the mayor, he shall by advice of council call the parties, and make a final end, with costs, &c.

But by the said *f. 37 H. 8. 12. f. 20.* if the mayor end not the suit in two months after complaint to him, or if any party is aggrieved by him, the chancellor on complaint, shall in three months make an end, with costs, &c.

And therefore, there can be no suit for tithes in *London*, pursuant to this act, in the ecclesiastical court: for another remedy is expressly appointed. *2 Inst. 660.*

And if a suit be for tithes pursuant to this decree, in the ecclesiastical court, a prohibition shall go. *Dub. Cro. Car. 596. Acc. 2 Inst. 660.*

Yet, there may be a suit for tithes in *London*, by bill in the *Exchequer*. *Vide post. (M 13, &c.)*

(M 8.) *In the courts of Westminster.* By *scire facias*, and *mandamus*.] Remedy for tithes in the courts of *Westminster* was by *scire facias*, *mandamus*, prohibition, *inducavit*, right of advowson, or action.

By the common law, a commission issued out of *Chancery* to inquire by an inquest, whether such a spiritual person had a right to the tithes of such land; and if the inquisition returned that he had, and afterwards another religious body, or ecclesiastical person, took the same tithes after severance, a *scire facias* lay upon this return, to shew cause why he took them; and the defendant pleaded to it, &c. *Seld. de Dec. 435. 2 Inst. 640.*

So, a *scire facias* lay by a patentee upon a grant to him of tithes by the king. *2 Inst. 640. Seld. de Dec. 441.*

And upon a fine executory of tithes. *2 Inst. 640. Seld. de Dec. 439.*

But a *scire facias* lay only against the pernor of the tithes after severance; not against the owner of the land for his subtraction. *2 Inst. 640.*

So, by the *f. 18 Ed. 3. 7.* (which though it be in the form of a patent, is a statute, *2 Inst. 639.*) such writs shall not be granted from henceforth, saving to the king his right, &c.

And

And therefore, after this statute a *scire facias* does not lie, except in the case of the king and his patentee. 2 *Inst.* 640.

Tho' the parties admit the jurisdiction of the court. 2 *Inst.* 641.

So, where the king had granted tithes to a church out of his land, &c. a *mandamus* antiently used to be directed to the sheriff, that he should permit the parson, &c. to enjoy them. *Seld. de Dec.* 445.

And sometimes such *mandamus* seems to be granted, where tithes belonged to a church out of other lands than those of the king. *Seld. de Dec.* 447.

But such writs have been discontinued many years.

(M 9.) *By prohibition.*] So, the party shall have remedy for tithes upon a prohibition in *B. R.* and *C. B.* the *Exchequer*, or *Chancery*, where the suit for them is out of the jurisdiction of the ecclesiastical court. *Vide Prohibition*, (A 2.—B—G 5, &c.)

As, if a suit be in the spiritual court for tithes of things for which no tithes are payable by law, a prohibition lies.

Of what things no tithes are due, *vide ante*, (H 14, 15, 16.)

So, by *β. 1 R.* 2. 13. if parsons, &c. sue in the spiritual courts for tithes, &c. and the judges be indicted, or by forced obligations, &c. be compelled to desist, &c. such obligations shall be null, and the procurers of such indictment shall incur the pain of the *β. W.* 2. 12. against such as procure false appeals.

(M 10.) *By right of advowson and indicavit.*] As to remedy for tithes by right of advowson, *vide Quare Impedit*, (B 1, 2.)

If a suit be in the spiritual court by a spiritual person, or his patron, for tithes, against another spiritual person, he or his patron shall have a writ of *indicavit* (which is in the nature of a prohibition) after libel, and before sentence. *Cod. Jur. Eccl.* 721. *F. N. B.* 30. *E. G. Seld. de Dec. c.* 14. *f.* 3.

Or, after sentence, if there be an appeal from the sentence. 12 *Ed.* 4. 13, 14.

And, it lies, by the common law, where the suit was in the spiritual court for tithes of any value. *Seld. de Dec. c.* 14. *f.* 3.

So, where a clerk was impleaded for the advowson itself, or the vicarage, prebend, or chapel, as well as where he was sued in the spiritual court for tithes of an advowson, vicarage, prebend, or chapel. *F. N. B.* 30. *L.* 45. *B.*

So, it lies, where a suit is for oblations, as well as for the advowson or tithes. *F. N. B.* 45. *D.*

So, it lies by the king where his clerk is sued, as well as by a common person. *F. N. B.* 45. *B.*

And commonly it is between four persons, *viz.* by one clerk and his patron, against another and his patron. *F. N. B.* 45. *B.*

If the church be appropriate to an abbot, it may be between three; *viz.* the abbot who is parson and patron, and the patron and parson of the other church: but there the abbot represents two persons. *R.* 12 *Ed.* 4. 13. *b.*

This writ is in the nature of a prohibition. *Vide F. N. B.* 30 *E.* 45. *B.*

And may be directed to the judge, as well as to the party. *F. N. B.* 30. *E.* 45. *B.*

And

And the plaintiff who sues an *indicavit*, ought to shew a copy of the libel in *Chancery*. *F. N. B.* 30. *G.* 45. *C.* 12 *Ed.* 4. 13. *b.*

But by the *st. de circumspecte agatis*, 13 *Ed.* 1. and by *Art. Cleri*, 9 *Ed.* 2. 2. if a parson demands oblations, or tithes due, or accustomed, or a parson sues another for tithes, so that the fourth part of the value of the benefice be not demanded, the spiritual judge shall have consufance, the king's prohibition notwithstanding.

And therefore, in the case of a common person, a writ of *indicavit* does not lie if the tithes do not amount to a fourth part of the value of the church. 2 *Inst.* 364. 12 *Ed.* 4. 13. *b.*

So, by the *st. W.* 2. 13 *Ed.* 1. 5. the patron of the parson disturbed by *indicavit*, shall have a writ to demand the advowson of the tithes in demand, and when it is deraigned, the plea shall pass in the court Christian.

And therefore, tho' the right of tithes before this statute could not be tried between the parsons after an *indicavit*; now the patron of the parson prohibited may have a writ of right of advowson, and if he recovers, the plea shall be remanded to the court Christian. *Cod. Jur. Eccl.* 721. 2 *Inst.* 364.

(M 11.) *By action.* By action upon the *st.* 2 & 3 *Ed.* 6. for the treble value.] So, by the *st.* 2 & 3 *Ed.* 6. 13. no person shall carry away predial tithes before he hath justly set forth the tithes, or agreed for the same with the parson, &c. or farmer, under pain of the treble value of the tithes carried away. *Vide post.* (M 18.)

Upon this statute debt lies at common law for the treble value, against him, who carries away his tithes without severance from the nine parts, or a composition for them. 2 *Inst.* 650. *Vide Dett.* (A 1.) —Pleader, (2 S 14, &c.)

[Evidence that the land had always been remembered to be in pasture, and had never within living memory paid any tithe, was holden insufficient to defeat an action on this statute. *Mitchel v. Walker*, *B. R.* *E.* 33 *Geo.* 3. 5 *T. R.* 260.]

And it lies by an impropriator or his lessee, tho' lay, as well as by an ecclesiastical person. *Vide* 2 *Inst.* 650.

But an action does not lie for the treble value for any other than predial tithes. 1 *Brownl.* 31. 2 *Inst.* 649.

So, an information does not lie by the king: for where the treble value is given as a recompence to the owner, an information does not lie for the king. 2 *Inst.* 650.

(M 12.) *By trespass.*] So, where tithes are severed from the nine parts, and afterwards a lay person takes them away, trespass lies. 50 *Ed.* 3. 20. *b.*

By the *st. Art. Cl.* 9 *Ed.* 2. 1. if a clerk, &c. sells his tithes, and afterwards demands the money before a spiritual judge, a prohibition lies: for by the sale, the tithes are made chattels.

So, if a parishioner sets forth his tithes, and a stranger takes them, and a libel be against him for it in the spiritual court, a prohibition lies. *Mo.* 912.

But by the *st.* 1 *R.* 2. 14. if a spiritual person be drawn in plea in the secular court, for his tithes taken, by name of goods taken, and he alledge the suit is for tithes due to his church; the general averment shall not be taken, without shewing specially how the same was his lay-chattel. *Cod. Jur. Eccl.* 724, 5. (M 13.)

(M 13.) *In a court of equity. In the Exchequer.*] So, upon a bill in the *Exchequer* by a parson against his parishioner for discovery and subtraction of tithes, the court decrees the single value, with costs and payment *in futuro*.

And this did not begin in the time of war; but was used *ab antiquo*. *Hard. 5. 116. Sav. 63. 38 Aff. pl. 20.*

And therefore, where the plaintiff demands the single value only, and makes proof of the quantity and value, the tithes shall be decreed. *R. Hard. 4, 5.*

So, a bill in the *Exchequer* may be for tithes in *London* upon the decree 37 *H. 8.* tho' by the *st. 37 H. 8. 12.* remedy is given before the mayor. *R. Hard. 116.*

And as the king himself may sue without question, so his patentee may: for he has the same personal privilege. *Hard. 116.*

So, a suit may be by will in the *Exchequer* between an impropiator and vicar, for tithes, where the king is patron. *Lane, 100. 1 Rol. 538. l. 45. Vide Courts, (D 2.)*

So, a bill may be for a discovery only, without paying relief, (in order to sue for the treble value at common law,) tho' he does not offer to take the single value only. *Semb. upon Demurrer, Hard. 190.*

[On a bill for tithes, defendant may move, that the value be ascertained by the oath of the plaintiff; and on consent the court will order it, and without consent, will order plaintiff to shew cause why he should not consent. *Baily v. Peasley, in Sc. T. 1718, Bunb. 26.*]

[If a bill is brought for tithes, glebe and common, the court will retain it till plaintiff makes out his title by an action to the two last. *Sweetapple v. D. of Kingston, T. 1727, Bunb. 238.*]

(M 14.) *The bill, when sufficient.*] A bill in the *Exchequer* ought to shew, how, or by what title the plaintiff demands tithes. *Vide Hard. 130. 321. Vide Chancery (3 C).*

[Lay-impropriator, if he sets out a title under the crown, and derives it down, must prove it; but if he does not set out such title, it is enough if he proves that the tithes belonged to those under whom he claims. *Leigh v. Maudsley, H. 1730, Bunb. 296.*]

[A lay impropiator need not prove payment of tithes to him, if defendant admits his general right, but claims exemption. *Benfon v. Olive, T. 1730, Bunb. 384.*]

[Where there is a lay-impropriator, plaintiff must shew in whom the fee is vested, and derive his title from thence. *Penny v. Hooper, T. 1722, Bunb. 115.*]

[A vicar must shew his endowment of the tithes for depasturing barren cattle, or that they have been usually received by the vicar. *Ayde v. Flower, T. 1716, in Sc. Bunb. 7.*]

[If a layman claims as lessee of a dean and chapter, it is a sufficient setting forth of title. *Burwell v. Coates, P. 1723, Bunb. 129.*]

[Bill by the bishop and sequestrator, during incapacity of mind of incumbent, is not good, unless the incumbent in person, or by his committee, is a party. *B. of London v. Nichols, M. 1723, Bunb. 141.*]

[Bill laying a custom, or *some such custom*, is bad. *Beaver v. Spratley, H. 1733, Bunb. 333.*]

[But if a vicar demands tithes, without saying how intitled, by prescription

scription or endowment, it is well, where the defendant by his answer admits him to be vicar, and does not controvert his right, but insists upon a satisfaction given. *R. Hard. 130. Pye v. Rea, in Sc. P. 1721, Bunb. 72.*

So, if the plaintiff shews, that he is vicar, and entitled generally. *R. Hard. 321.* tho' it is there said, that such bill has been held insufficient upon demurrer.

[In bill by vicar for tithe, herbage, and furze, it is sufficient if he shews that he was entitled to all small tithes, and one composition for the land in question. *Goole v. Jordan, H. 1723, Bunb. 144.*]

So, it is sufficient, if the plaintiff shews, that he is rector, and entitled to the tithes in the parish, without more.

[In equity they never hold the parson to the proof of his admission, institution, induction, and reading the articles. *Per totam Curiam, Woodcock v. Smith, in Sc. T. 1718, Bunb. 25.*]

But if the plaintiff by his bill demands the treble value, his bill shall be dismissed. *R. 3 Leo. 204.*

So, if he does not make proof of the quantities and values of the tithes, where the defendant insists upon an extinguishment by unity of possession: for no damage to the plaintiff appears. *R. Hard. 4.*

[In a bill for a portion of great and small tithes in another parish, the vicar of that parish must be a party. *Baily v. Worrall, T. 1722, Bunb. 115.*]

(M 15.) *The plea.*] The defendant, upon a bill for tithes, may plead non-residence, &c. without shewing quantities and values. *R. Ca. Eq. 228. (Vide Com. 392, 3.)*

[If bill is brought for tithes, by the lessee of the parson with cure of souls, defendant may plead the non-residence of the parson for 80 days before filing the bill, without setting forth the quantities, &c. for the lease is void. *Mills v. Etheridge, H. 1725; Quilter v. Lowndes, Quilter v. Massenden, P. 1726; Bockenham v. Bentfield, M. 1726, Bunb. 210.*]

[*Sed qu.* If rector and lessee join in the bill: for by non-residence, before sentence, he only forfeits his lease and rent, not his tithes. *Atkinson v. Peasley. Ibid.*]

[If the plea does not shew that the non-residence was not after the time wherein the tithes were demanded, it is bad. *Anon. M. 1726, Ibid.*]

Or, [defendant may plead] a *modus*, if he shews quantities and values. *Ca. Eq. 228.*

[If defendant pleads payment of money in satisfaction, he must shew quantities and values. *Gumley v. Fontleroy, in Sc. P. 1720, Bunb. 60.*]

But the statute of limitations is no plea. *Ca. Eq. 229.*

[For defendant is in the nature of a receiver for plaintiff. *Marrison v. Cleypole, P. 1726, Bunb. 213.*]

[To a bill for tithes, setting forth a former bill in *Sc.*, and a decree for these tithes; after issue to try *modus*, and a verdict for plaintiff, defendant may plead in bar a subsequent suit in Chancery, and issues directed and found for the *modus*, and decree to establish them. *Geale v. Wyntour, H. 1725, Bunb. 211.*]

(M 16.) *The answer.*] The defendant by his answer ought to answer all the material parts of the bill.

If he insists by his answer (and not by plea) upon a discharge by a *modus*, he ought to answer to quantities and values; and an examination upon interrogatories, if the *modus* be proved, does not excuse from a full answer. *R. Hard. 130. (Vide Com. 392.)*

So, if he insists upon a *modus*, by plea: for the plea does not go to the right of the plaintiff, but to avoid the account by the defendant. *Semb. cont. Hard. 130.*

Yet it is sufficient by answer to say, that the lands belonged to such an abbey, &c. which was of such an order, and therefore by *stat. 31 H. 8.* ought to be discharged, without more certainty. *R. Hard. 322.*

[If defendant answers, that the manor was part of the possessions of the priors of *St. John of Jerusalem*, it is a good discharge. *Hanson v. Fielding, P. 1726, Bunb. 214.*]

[It is not sufficient to say the lands were formerly in the hands of the abbot of *A.*, one of the greater monasteries dissolved by *31 H. 8.* it must say they were discharged in his hands. *Hanking v. Gay, in Sc. H. 1718, Bunb. 37.*]

[It is sufficient, if it says that the lands where, &c. were part of the bishop's palace, and therefore exempt; tho' he does not lay it personally in the bishop, because the exemption goes with the lands; tho' it would be better to lay it by prescription. As to lands belonging to monasteries, they must set out how the prescription is. *Benning v. Dowie, in Sc. T. 1718, Bunb. 26.*]

So, if a demand be of tithes by custom of things, for which none are due *de jure*, he need not answer to quantities or values, if he denies the custom; for it is sufficient that he be examined upon interrogatories when the custom is tried. *R. Hard. 188.*

[It is sufficient to set forth what tithable matters he has, and to say he had no other tithable matters whatever. *Bakor v. Planner, P. 1722, Bunb. 108.*]

[On a bill for tithe-wood, if defendant insists it was timber, the court will presume it was above twenty years growth, unless plaintiff prove the contrary. *Lloyd v. Mackworth, M. 1723, Bunb. 138.*]

So, by bill in *Chancery*. *Vide Chancery, (3 C.)*

(M 17.) *In Chancery.*—[By *st. 7 & 3 W. 3. c. 34. s. 4.* where any quaker shall refuse to pay or compound for his great or small tithes, or to pay any church rates, the two next justices of peace of the same county, neither of whom is patron of the church or chapel, from whence the said tithes arise, nor any ways interested in the said tithes, on complaint of any parson, &c. by warrant under their hands and seals, may convene before them such quaker, and examine upon oath, or in such manner as by this act is provided, the truth of the complaint, and ascertain and state what is due and payable by such quaker to the party complaining, and by order under their hands and seals direct the payment thereof, so as the sum ordered do not exceed 10*l.*; and on refusal, any one of the said justices, by warrant under his hand and seal, may levy the money ordered, by distress: any person aggrieved may appeal to the next general quarter sessions for

for the county, &c. who may reverse or confirm the order; and no proceedings under this act shall be removed by *certiorari*, &c. unless the title of such tithes shall be in question.]

[But this act being temporary and relating only to great and small tithes and church rates, it was by *ft. 1 G. 1. ft. 2. c. 6. f. 2.* made perpetual, and extended to any tithes or rates, or any customary or other rates, dues, or payments belonging to any church or chapel, which of right by law or custom ought to be paid for the stipend or maintenance of any minister or curate officiating in any church or chapel.]

[Under these acts, the mere circumstance of the quakers' *controversing* the title, and *asserting* that the title was in question, without shewing on what principle they dispute the title, is not sufficient to found an application for a *certiorari*. 1 *Bur.* 488.]

(M 18.) *The remedy upon a disseisin of tithes.*] By *ft. 32 H. 8. 7.* if any having an inheritance, freehold, term, or interest in a parsonage, vicarage, portion, tithes, &c. or other ecclesiastical profit, which be or shall be made temporal, or in temporal hands, be disseised, &c. he may have remedy in the temporal courts by *præcipe quod reddat*, assize, *mortd'ancestor*, *quod ei deforceat*, dower, or other writ original, &c. in like manner as of other lands or tenements.

By the *ft. 27 H. 8. 28. 31 H. 8. 13. 37 H. 8. 4. and 1 & 2 Ed. 6. 14.* for the dissolution of houses of religion, and this act of *32 H. 8. 7.* and the *ft. 1 & 2 Ph. & M. 8.* tithes and other ecclesiastical duties, which come to the king, are temporal inheritances, and have all the incidents of other inheritances. *Co. L. 159. a. Vide Advowson (E).*

And therefore, shall be assets in the hands of an heir, or executor. *Co. L. 159. a.*

A wife shall have dower of them. *Co. L. 159. a.*

And a husband be tenant by the curtesy. *Co. L. 159. a.*

So, the same actions and remedy shall be allowed for them as for other estates.

An ejectment lies for tithes. *Cro. Car. 301. R. Jon. 322.*

So, tithes or a rectory impropriate, being lay-fee, cannot be sequestred in the spiritual court, for not repairing the chancel, &c. *Semb. 2 Vent. 35.*

[Tithes have every property of an inheritance in land, except that they lie in grant and not in livery: and therefore, if lessee of tithes covenant for him and his assigns, that he will not let any of the farmers in the parish have any part of the tithes; this covenant runs with the tithes, and binds the assignee, against whom the action is brought, for breach of covenant. 3 *Wils.* 25. 30.]

(N) Assurance of Tithes.

BY the *ft. 32 H. 8. 7.* writs of covenant, and all other writs for fines, and all other assurances shall be devised and granted in Chancery of parsonages, vicarages, tithes, &c. as are used of other lands; and shall be of like force.

DISPENSATION.

Vide Condition (P).—Copyhold, (M 8.)—Forfeiture, (A 11, 12.)—Prærogative, (D 4, &c. 18, &c.)

DISPOSITION.

Disposition by a Wife.

Vide Baron and Feme, (P 1. 3.)—Chancery, (2 M 14, 15.)

DISSEISIN.

Vide Abatement, (H 47.)—Dismes, (M 18.)—Garranty, (I 1.)—Rent, (D 2.)—Seisin, (F 1, &c.)

Novel Disseisin.

Vide Affise, (B 1, &c.)

Re-disseisin, and Post-disseisin.

Vide Affise, (F 1, &c.)

DISSOLUTION.

Dissolution of a Corporation.

Vide Franchises, (G 4, &c.)

———— of Hospitals.

Vide Hospital, (B.—C.)

———— of Monasteries.

Vide Dismes, (C 5.—E 7.)—Monastery.

———— of Marriage.

Vide Parliament, (H 3.)

———— of Parliament.

Vide Parliament, (P 1, 2.)

DISTRESS.

(A) Distress.

(A 1.) When it may be taken.

FOR all services a distress may be made of common right. *Doct. & St. l. 2. c. 9. Co. L. 150. b.*

As, for rent-service. *45 Ed. 3. 15. b. 1 Rol. 665. l. 37. Co. L. 142. a.*

So, for heriot-service. *1 Rol. 665. l. 47. Vide Copyhold, (K 21.)*

So, for suit-service: as, suit to a hundred-court, or court-baron. *1 Rol. 665. l. 40. Vide Copyhold, (K 17.)*

So,

So, for a fine assessed in a court, a distress is due of common right.
1 *Rol.* 666. l. 4. *R.* 8 *Co.* 41. b.

So, for an amerciament in a court-leet, for an offence in or out of court. *D. Kel.* 66. b. 1 *Rol.* 665. F. *R.* 8 *Co.* 41. *Sav.* 94. *R.* cont. that there ought to be a custom alleged for distraining, 1 *Sal.* 175. *R. acc.* 9 *H.* 7. 21. b. *D.* that in the case of a common person there ought to be a custom alleged; otherwise in a leet of the king. *Cro. El.* 748. *Vide Leet*, (O 10.)

So, a distress might be for aid *pur faire Fitz Chivaler, ou File marrier.* 1 *Rol.* 665. l. 42.

So, for a relief the lord himself may distrain. 1 *Rol.* 665. l. 45.

Or, *pro valore maritagii.* *D. Cro. Car.* 533.

So, for trespass with cattle, a distress may be of the cattle *damage-feasant.*

[A tenant holding over after the expiration of his term cannot distrain the landlord's cattle which were put upon the premises by way of taking possession. *Taunton v. Costar*, B. R. M. 38 *Geo.* 3. 7 T. R. 431.]

And a bailiff, by his office, may distrain without a special warrant. *Dub. Cro. El.* 698. *Vide Cro. El.* 748.

But for a thing due against common right, a distress cannot be made without a prescription: as, *pro certo letæ*, he ought to prescribe to distrain for it, as well as to have it. *R.* 11 *Co.* 44. b.

So, for an amerciament in a court-baron. *D.* 11 *Co.* 45. a. *Doct.* & *St. l.* 2. c. 9. 1 *Rol.* 666. l. 6.

So, for toll in a fair. 1 *Rol.* 666. l. 10. 15. *Hob.* 187.

[But a distress cannot be made for the toll of goods fraudulently sold out of the market, to avoid the toll: but the party injured must bring a special action on the case. *Cowp.* 661.]

So, for a tax chargeable by custom in a vill, &c. for the repair of a bridge. 1 *Rol.* 666. l. 20.

So, for *land-cheap*, or the like customary payment within a vill, &c.

So, for the profits of a court-baron reserved to the lord upon the grant of a manor. *R. Mo.* 870.

So, for a fine granted *pro licentia concordandi.* *Semb.* 1 *Leo.* 249.

So, for the cattle of the lord where the tenants have the sole pasture. *Semb.* 2 *Cro.* 208.

So, for a fine assessed in a leet by custom for refusing to be sworn constable. *R. Skin.* 636.

So, for a relief upon an alienation, where due only by custom, and not by tenure, or reservation. *Jon.* 123.

So, for debt, account, or contract, &c. a distress cannot be taken. *Doct.* & *St. l.* 2. c. 9.

Nor, for waste, reparation, &c. *Doct.* & *St. l.* 2. c. 9.

So, for a service wholly uncertain, a distress cannot be taken; as, for service in *frankalmoigne.* *Co. L.* 96. a.

[So, if a lessee for years assign his term, he cannot distrain for the rent, because the reversion is not in him. 2 *Will.* 375.]

So, a man cannot take two distresses for the same rent: for it was his folly that he did not take sufficient at first. *R. Mo.* 7. *Cro. El.* 13. *R. Lut.* 1536.

Tho' he alleges that his first distress was but of such a value, and that it was not sufficient. *Dub. Cro. El.* 13. 2. *Lut.* 1536. [*Vide* 1 *Bar.* 579, et seq.]

But for rent due at several days, he may take several distresses; tho' the whole was due at first. *Mo. 7.*

[It may be taken for rent under a lease, tho' the tenant entred before the commencement of it. *Macdonel v. Welder, P. 9 G. Str. 550.*]

[An annuitant, who has a term for years vested in him, to secure the payment of the annuity may distrain for arrears; for the grantor of the annuity is a mere under tenant, during the term, to the grantee. 2 *Black. Rep. 1326.*]

[A mortgagee, after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice. *Doug. 279.*]

(A 2.) At what Time.

A distress for *damage-feasant* may be in the night: otherwise the cattle may escape. *Co. L. 142. a. Vide Doct. & St. l. 2. c. 9.*

But for a rent-service or a rent-charge a distress cannot be in the night. *Co. L. 142. a.*

A distress for rent cannot be made upon the day in which the rent is payable: for it cannot be due till the last moment of the day. *Doct. & St. l. 2. c. 9. Co. L. 47. b. [See ft. 8 Ann. c. 14. s. 6, 7.]*

So, it cannot be after the term ended. 1 *Rol. 672. l. 15. Doct. & St. l. 2. c. 9. Co. L. 47. b. [Smith v. Mapleback, B. R. M. 27 G. 3. 1 T. R. 441.]*

Tho' the lessee continues in possession by sufferance, or by wrong, after his lease expired: for he is not in, in privity of the lease. *Cont. Kel. 96. a. R. acc. 1 Rol. 672. l. 20.*

So, a distress cannot be for rent after his estate is determined: as, if a man seised of a rent-charge, or rent-service, in fee, or for life, grants over his estate, he cannot distrain for arrears due before his grant. 4 *Co. 50. b. Ognel. 1 Rol. 672. l. 30. Co. L. 162. b. Vide Dett (B).*

So, if a grantee of a rent for years if he so long live, dies, his executor or administrator cannot distrain for the arrears by the common law, nor by the *ft. 32 H. 8. 37. Cro. Car. 471.*

So, if a man seised in fee, tail, or for life, of a rent, or fee-farm, dies, his executor or heir cannot distrain by common law for the arrears incurred in his lifetime. *Co. L. 162.*

Nor, since *ft. 32 H. 8.* for relief, aids, or corporal service. *Co. L. 162. b.*

Nor, for a *nomine pœne.* *Co. L. 162. b.*

Yet, if a lessee for 20 years leases for 10 years, and dies, his executor or administrator may distrain for arrears incurred in his lifetime: for the executor represents his testator, and has the reversion and rent annexed, in the same plight as his testator had it. *R. 1 Rol. 672. l. 35.*

So, if a lease be *de anno in annum quamdiu*, &c. and after a subsequent year commenced the lessee dies; the lessor may distrain upon the executor or administrator: for the lease continues till the end of the year. *R. Sal. 414. (Vide Lut. 214.)*

[Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder, and after

after the expiration of it; a distress may be taken for rent due for the whole term. *Braithwaite v. Cockfey*, C. P. T. 30 Geo. 3. 1 H. Bl. 465.]

And now, by the *stat.* 32 H. 8. 37. an executor or administrator of any seised of rent-service, charge, or feck, or of fee-farm in fee, tail, or for life, may have debt, or distrain for arrears due in the life of the testator, or intestate.

And an husband seised in right of his wife, may do so for arrears incurred in her life, before or after coverture. *Sec.* 3.

So, may tenant *pur auter vie*, his executors and administrators, for arrears incurred during the life of *cestuy que vie*. *Sec.* 4.

And all rents in money, or in corn, cattle, pepper, &c. are within the statute. *Co. L.* 162. b.

So, a distress may be upon the land so long as it is in possession of him that ought to pay, or any claiming by, from, or under him. *R.* 4 *Co.* 50.

So, by the *stat.* 8 Ann. 14. a lessor may distrain in six calendar months after a lease for life, for years, or at will is determined: so as the lessor's title or interest, and the possession of the tenant from whom the rent became due, be continuing. [See also *stat.* 4 Geo. 2. c. 28. s. 6.]

[And where, by the custom of the country, the tenant may, after the expiration of the term, and after having quitted the premises, leave the away-going crop in the barns, &c. of the farm for a certain time, the landlord may, *within that time*, tho' more than six months have elapsed since the expiration of the term, distrain the goods so left in arrear. *Beavan v. Delahay*, C. P. E. 28 Geo. 3. 1 H. Bl. 5.]

[So, if a trader, after committing an act of bankruptcy, take a house and agree to pay half-a-year's rent in advance, where, by the custom of the country, half-a-year's rent becomes due on the day on which the tenant enters; the landlord, after assignment under the commission, and before the year expires, may distrain the goods on the premises for half-a-year's rent; or if he buy the tenant's goods at the sale under the commission, he may retain the amount of the half year's rent. 2 *Term Rep.* 600.]

(A 3.) In what Place.

A man may distrain for a rent-service in any part of the land holden.

So, for a rent charged, or reserved upon a lease, upon any part of the land out of which the rent issues.

And if a house be upon the land demised or charged, a distress may be in the house, when the house is open.

So, a distress may be in a house thro' the doors or windows. 1 *Rol.* 671. l. 7. 17.

If the land lies in two counties, a distress may be for the whole rent in either county. 1 *Rol.* 671. l. 30.

So, if it be in the hands of many tenants, it it may be for the whole in the land of any tenant. 1 *Rol.* 671. l. 35.

[But if two parcels of land are let by the same lessor to the same lessee by separate demises, and rent due on both, there cannot be a joint distress for both. *Rogers v. Birkmire*, P. 9 G. 2. Str. 1040, B. R. H. 245.]

So, if cattle are driven to avoid the distress when the lord, &c. is

in view, they may be pursued freshly, and taken in land out of his fee, or the land holden. 1 *Rol.* 671. l. 40. *Co. L.* 161. a.

So, by the *st.* 8 *Ann.* 14. if a lessee clandestinely carry off goods from the demised premises to prevent a distress, the lessor, or any empowered by him, may in five days after carrying off, take such goods, wherever found, for the rent-arrear, and sell or dispose the same, as if distrained on the premises: provided the lessor may not seize as a distress goods sold *bonâ fide*, and for a valuable consideration, before such seizure made.

[By the *st.* 11 *G.* 2. 19. within 30 days.—And the lessor may break open an house to seize them in the day time.—And may distrain stock or cattle and crops growing on the premises. *Vide this Statute.*]

So, the king may distrain for a rent-service in all the lands of his tenant held of him, or of others. 1 *Rol.* 670. l. 15. 2 *Inst.* 131.

And if the lessee makes an under-lease after the arrears incurred, the king may distrain in all the lands of the under-tenant for the arrears. *R.* 1 *Rol.* 670. l. 25. 1 *Rol.* 159. l. 45.

So, by *st.* 22 *Car.* 2. 6. a purchaser of a fee-farm-rent shall have the same remedy as the king might have, by distress, upon all the lands of the terre-tenant. 2 *Ver.* 714.

Yet the king cannot distrain in lands of his tenant, which are not in his actual possession and manured with his own cattle: as, in lands of the tenant, demised for life, for years, or at will. 2 *Inst.* 132. 2 *Ver.* 714.

So, if a demise be of a manor, &c. to which an advowson belongs, a distress for rent cannot be in the glebe of the advowson. 1 *Rol.* 671. l. 22. 35.

So, a man may distrain for an amerciamment in the sheriff's turn, in any lands of the party within the county: for it is personal. 1 *Rol.* 670. l. 30.

And for an amerciamment in a hundred or leet, within the whole hundred or leet. 1 *Rol.* 670. l. 35. 40.

Yet a distress cannot be for an amerciamment in a leet, &c. upon land in the king's possession within the precinct of the leet: for during the king's possession it is out of the jurisdiction. 1 *Rol.* 670. l. 50.

But by the *st.* of *Marl.* 52 *H.* 3. 15. *nulli liceat ex quâcunque causâ districtionem facere extra feodum suum, nisi domino regi & ministris suis, &c.*

And this was but an affirmation of the common law. 2 *Inst.* 131.

Wherefore none can distrain out of the lands holden, or out of those from which the rent issues. 1 *Rol.* 671. l. 10. 12.

And tho' cattle escape out of the fee when they are in view, the lord cannot distrain them. 2 *Inst.* 131. *Co. L.* 161. a.

Or, if they be driven out for any lawful cause, except for avoiding the distress. 1 *Rol.* 671. l. 45. *Co. L.* 161.

So, if they be driven by the tenant before the view of the lord, tho' it be for avoiding the distress. *Co. L.* 161. a.

So, if cattle *damage-feasant* are driven out of the land after view, they cannot be distrained. *Co. L.* 161. a.

If a man distrains out of his fee, trespass lies. 2 *Inst.* 131.

Or, an action upon the *st.* of *Marlb.* 2 *Inst.* 131.

So, by the *st.* of *Marlb.* 15. none can distrain in *viâ regia*, or *communi strata*.

Tho' it be within his fee.

If a man distrains in the highway, an action lies upon the *ft. of Marl.* 2 *Inst.* 131.

But a man shall not avoid the distress, in *replevin*: for it is not void. 2 *Inst.* 131.

But the king may distrain in the highway.

So, a distress for an amerciamēt may be in the highway. 2 *Rol.* 670. l. 44.

So, for toll-thorough, &c.

So, for a rent-charge, if it be parcel of the thing out of which the rent issues: for the *ft. of Marl.* extends only to a distress to rents and services. 2 *Inst.* 131. *R. Cro. El.* 710.

(B) What Things may be distrained.

(B 1.) For Rent-Service.

GENERALLY, all moveable goods, and chattels of the lessee may be distrained, for rent due, if they are found upon the land demised.

So, moveable goods and chattels of the tenant, for services due to his lord.

And of the terre-tenant, for a rent-charge.

So, cattle of a stranger which are put, or escape into the land out of which the rent issues, may be distrained for such rent. 11 *H.* 7. 4. a. 15 *H.* 7. 17. b. *R.* 2 *Sand.* 289. 1 *Rol.* 668. l. 5—30. 671. O. *Vide infra.*

Tho' they never were *levant and couchant* upon the land. 15 *H.* 7. 17. b. *R.* 2 *Sand.* 289. *Co. L.* 47. b.

Tho' the escape was for default of the fences of the same land. *R.* 2 *Sand.* 289. *R. Pal.* 43. 2 *Rol.* 124.

And tho' the fences ought to be repaired by the lessor himself, or his tenant, *Semb.* 2 *Sand.* 289. *But Sanders doubted of it. Dub. per Holt, Mod. Ca.* 198.

So, if cattle driven to *London* are depastured by the way, they may be distrained for the rent of the land where they are depastured. *R.* 2 *Vent.* 50. 3 *Lev.* 261.

Tho' put there with the assent of the lessor. *R.* 2 *Vent.* 50. 3 *Lev.* 261.

Tho' it was a common inn at which the cattle were depastured. *Qu.* 2 *Vent.* 50. *And the party was relieved upon this in equity.* 2 *Ver.* 130. *Pr. Ch.* 7.

But if cattle, going to market, are depastured by the way, in land belonging to a common inn, they cannot be distrained for the rent of the land. *Not R.* 3 *Lev.* 260. *But said,* that they are not privileged tho' going to market. 2 *Vent.* 50. [4 *T. R.* 567.]

So, if *A.*, tenant in common with *B.* and *C.*, leases his third part, the cattle of *B.* or *C.*, or any depasturing by their licence, cannot be taken for rent by *A.* *R.* 2 *Vent.* 228. 283.

So, if cattle escape into the close of *B.* and are freshly pursued, they cannot be taken for rent of the close. *R.* 1 *Brownl.* 170.

So, if cattle which escape be distrained for a long arrear of rent, the owner shall be aided in equity. 2 *Ver.* 131. *Pr. Ch.* 8.

(B 2.) For a Rent-Charge.

But for a rent-charge, generally, the cattle or goods of a stranger cannot be distrained. *Dub.* 15 *H.* 7. 17. *b.* *Cont.* 1 *Rol.* 669. *l.* 25. *Qu.* 1 *Rol.* 668. *l.* 13. *R. acc.* 1 *Rol.* 672. *l.* 12.

So, if one joint-tenant grants a rent-charge, the cattle of his companion cannot be distrained. 1 *Rol.* 669. *l.* 20.

So, if a man makes a lease, and afterwards grants a rent-charge out of the land, the cattle of the lessee are not distrainable: for he claims paramount the charge. 1 *Rol.* 669. *l.* 45.

So, if a rent-charge be granted out of a manor, the cattle of the copyholders are not distrainable. *R.* 1 *Rol.* 669. *l.* 52.

Or, if a rent-charge be claimed out of a manor, by prescription. *Dub.* 1 *Rol.* 669. *l.* 50.

Yet where a stranger claims under the grantor after the grant of a rent-charge, his cattle are liable to distress: as, the cattle of a lessee, where the demise was after the grant.

So, if a joint-tenant grants a rent, and afterwards leases to his companion for years, his cattle are distrainable. 1 *Rol.* 669. *l.* 30. 40.

So, if part of the land charged comes to a tenant in common of another part of the same land. *R. Hob.* 80. 1 *Rol.* 670. *l.* 5.

(B 3.) For an Amerciament, &c.

So, the cattle, or goods, of a stranger cannot be distrained for an amerciament, &c. *Cont.* 1 *Rol.* 669. *l.* 7. *Acc.* *F. N. B.* 100. *H.*

Vide ante, (A 1, 3.)—*Leet*, (O 10.)

(B 4.) For Damage-feasant.

But all chattels trespassing upon land may be distrained *damage-feasant*.

[A distress *damage-feasant* is a summary execution in the first instance; the distrainer must take care to be formally right. He must seize the cattle in the act, upon the spot; for if they escape, or are driven out of the land, tho' after view, he cannot distrain them; he must observe a number of rules, in relation to the impounding and manner of treating the distress. *Per* *Ld. Mansfield C. J.* *Lindon v. Hooper*, *B. R. H.* 16 *Geo.* 3. *Cowp.* 417.]

The cattle of *A.* may be distrained *damage-feasant*, tho' put there by a stranger, without his privity. *R.* 1 *Rol.* 665. *D.*

So, ferrets, greyhounds, &c. which chase conies in a warren, may be distrained *damage-feasant*. 1 *Rol.* 664. *l.* 40, 41.

But a horse upon which a man rides upon the corn of another, cannot be taken *damage-feasant*. 1 *Rol.* 664. *l.* 45. [*Story v. Robinson*, *B. R. H.* 35 *Geo.* 3. 6 *T. R.* 138.] *Cont. per Ch. Justice*, 1 *Sid.* 440.

Nor, a net, which a man carries in his hand upon my land. 1 *Rol.* 664. *l.* 43.

(C) What not.

BUT for a rent-service, &c. things fixed to the freehold cannot be distrained: as, the doors or windows of a house. *Co. L.* 47. *b.* 14 *H.* 8. 25. *b.* *Vide ante*, (A 1, &c. B 1, &c.)

Furnaces, cauldrons, &c. fastened to the house. *Co. L.* 47. *b.*

[Neither can a limekiln if affixed to the freehold. *Niblet v. Smith*, *B. R. H.* 32 *Geo.* 3. 4 *T. R.* 504.] Nor,

Nor, corn growing upon the land. 1 *Rol.* 666. l. 47. [Now allowed by the *st.* 11 *G.* 2. 19. *quod vide.*]

Nor, a millstone fixed to a mill. 14 *H.* 8. 25. *b.*

Tho' it be removed to be picked for the use of the mill. 14 *H.* 8. 25. *b.*

Otherwise, if wholly severed, and removed from the mill. 14 *H.* 8. 25. *b.*

So, things of which no one has a valuable property, cannot be distrained: as, things *fera natura*, deer, conies, &c. in a park or warren, *Co. L.* 47. *a.*

[Deer in an inclosed ground may be distrained for rent. *Davies v. Powell, C. P. H.* 11 *Geo.* 2. *Willes*, 46.]

Nor, poultry, fish, &c. 2 *Inst.* 133.

Nor, a dog. *Co. L.* 47. *a.* [*Willes*, 46. *contra.*]

Nor, utensils of trade, or things used in trade; for it is for the public good that trade be encouraged; and therefore, the books of a scholar shall not be distrained. *Co. L.* 47. *a.*

Nor, the axe, or other instruments of a carpenter, &c. *Co. L.* 47. *a.*

Nor, an anvil in a smith's shop. 14 *H.* 8. 25. *b.*

Nor, a millstone in a mill. 14 *H.* 8. 25. *b.*

Tho' the anvil be removed out of the stock, or the millstone out of the mill to be picked. *R.* 14 *H.* 8. 25. *b.*

So, by the *st.* 51 *H.* 3. *de districtione Scaccarii*, beasts of the plough, or which improve the land, as sheep, &c. shall not be distrained, if there be other sufficient distress: which was an affirmance of the common law. 2 *Inst.* 132. *Co. L.* 47. *a.*

Nor, a saddle-horse. 2 *Inst.* 133. 1 *Rol.* 667. l. 35.

Nor, armour, jewels, apparel, &c. 2 *Inst.* 132.

So, an horse in a smith's shop shall not be distrained for the rent of the shop. *Co. L.* 47. *a.*

Nor, an horse in an hostry. *Co. L.* 47. *a.*

Nor, cloth, or garments in a taylor's shop. *Co. L.* 47. *a.*

Nor, materials for cloth in a weaver's shop. *Co. L.* 47. *a.* *R. Cra. El.* 550. 596.

Nor, corn or meal sent to the mill, or market. *Co. L.* 47. *a.*

Tho' the cloth, &c. be many days at the shop. *Per Brian*, 22 *Ed.* 4. 49. *b.* 1 *Rol.* 668. l. 35. 40.

Nor, any goods delivered to any person in the way of his trade. 1 *Sal.* 250.

Or, delivered to any one to be carried for hire: for he is a common carrier as to them. *R.* 1 *Sal.* 250.

Yet beasts of the plough may be distrained, if there be no other distress.

And instruments of trade, if they are unnecessary. 1 *Sal.* 249.

[Or, if they are not in actual use at the time of the distress, or if there be no other sufficient distress on the premises. *Simpson v. Hartopp, C. P. M.* 18 *Geo.* 2. *Willes*, 512. *Gorton v. Falkner, B. R. H.* 32 *Geo.* 3. 4 *T. R.* 565.]

So, a ship, sails, or tackle, for a duty which arises from the ship: as, for toll for goods laden upon the ship. *R.* 1 *Sal.* 249.

So, utensils of trade, &c. can be taken for a distress in the nature of an execution: as, for a rate to the poor. *Per Sand. Ob. on st.* 22 *Car.* 2. *Ch.* 1. p. 39.

[See

[See this distinction between a distress for rent, &c. and a distress in the nature of an execution, very fully investigated in 1 *Bur.* 579, & seq.]

So, an horse in a cart loaden with corn. *R.* 1 *Sid.* 422. 440.

[A race-horse standing in a stable, half a mile from the inn, may be distrained. *Barnes*, 472.]

[A chariot standing at a livery-stable may be distrained. *Francis v. Wyatt*, T. 4 G. 3. 3 *B. M.* 1498. 1 *Bl. Rep.* 483.]

So, goods shall be privileged from distress, when they are in use: as, an axe, &c. with which a man is cutting wood. *Co. L.* 47. a.

An horse on which a man is riding. *Co. L.* 47. a. 1 *Sid.* 440.

So, if a man in a journey, by sickness, stays two or three weeks, his horse shall be privileged. 1 *Rol.* 668. l. 5.

So, if an horse goes with corn to a mill, and is at the house of the mill till the corn be ground. *R. Cro. El.* 550.

Or, during that time he be put into the stable. *Per two J. Warburton cont. Cro. El.* 550.

So, if an horse goes with yarn, &c. to a weaver, &c. or fetches yarn thence, and carries it to a private house to be weighed, and is hung there till the yarn be weighed. *R. Cro. El.* 550. 596.

So, if goods delivered to a carrier be put into a waggon in a private barn. *R.* 1 *Sal.* 250.

Yet for a rent-charge, horses in a cart loaden with corn upon the land, may be distrained. *R.* 1 *Sid.* 422. 440. 1 *Vent.* 36.

Tho' a man be upon the cart. *Qu.* 1 *Sid.* 440.

So, things shall not be distrained which cannot be known to be replevied, or to be restored in the same plight: as, money out of a bag. 1 *Rol.* 666. l. 51.

Meal or grain out of a bag. *Vide* 1 *Rol.* 667. l. 4. 6.

Nor, corn in shocks or straw; nor, hay in a barn. 1 *Rol.* 666. l. 53. 667. l. 16. *R.* 2 *Mod.* 61. *R. Jon.* 197.

[Sheaves of corn cannot be distrained for arrears of an annuity, but sheaves in a cart may; and *carectat. tricit in garbis*, shall be understood a cart loaded with sheaves. *Horton v. Arnold*, T. 4 G. 2. C. B. *Fort.* 361.]

But now, by the *st.* 2 *W. & M.* 5. any person, having rent-arrear on a demise, may seize sheaves or shocks of corn, or corn in the straw, or loose, or hay in a barn, granary, or upon a hovel, stack, or rick, otherwise, upon any part of the land charged with such rent; and lock up and detain the same in the place where found, &c. so as such corn be not removed to the prejudice of the owner, &c. till replevied or sold.

And before this statute, waggons or carts with corn might be distrained for rent: for they might be safely restored. *Co. L.* 47. a. *Jon.* 197.

So now, corn may be distrained, be it threshed or not threshed. *R. Lut.* 214.

[*Vide st.* 11 G. 2. 19.]

[Corn sown by a tenant at will, (who died before harvest,) and purchased by another person, cannot be distrained for rent due from a subsequent tenant. *Eaton v. Southby*, C. P. T. 10 & 11 Geo. 2. *Willes*, 131. 7 *Mod.* 251. S. C.]

[*Qu.* Can goods taken in execution be distrained for rent? *Ibid.*]

(D) How a Distress shall be treated.

(D 1.) It shall be impounded.

EVERY distress ought to be impounded in a lawful pound. *Co. L. 47. b.*A lawful pound is either open or close. *Co. L. 47. b.*An open pound is every place in which the putting the cattle does not make the owner a trespasser, and where he may give them to eat and drink without trespass. *Doct. & Stud. l. 2. c. 27. Vide 5 H. 7. 9. b.*Be it a common pound erected on the manor for this purpose. *Co. L. 47. b.*Or, the close of the party, who makes the distress. *Co. L. 47. b.*Or, the close or soil of a stranger with his leave. *Semb. 5 H. 7. 9. Co. L. 47. b.*A pound close is where the goods are put into an house or other place, where the owner cannot enter to them. *Co. L. 47. b.*Furniture, and goods, which will be damaged by the weather, or are in danger of being stolen, ought to be put in a pound close; otherwise the impounder shall answer for them. *Co. L. 47. b.*If cattle be impounded in a pound close, the impounder shall sustain them without allowance for it. *Co. L. 47. b.*But if they be put in an open pound, they shall be sustained at the peril of the owner. *Co. L. 47. b.*By the common law, a distress might be impounded where the party pleased. *2 Inst. 106.*By the *st.* of *Marlb.* 52 H. 3. 4. it shall not be impounded out of the county.And this extends to all goods, or cattle distrained. *2 Inst. 107.*And if a distress for a rent-charge or *damage-feasant* be carried out of the county, the party shall make ransom. *2 Inst. 106.*If a distress be for a rent-service, he shall be amerced. *2 Inst. 106.*And the *st.* of *Marlb.* as to all taking of cattle is confirmed by the *st. W.* 1. 16.And by the *st.* 1 & 2 *Ph. & M.* 12. no distress of cattle shall be carried out of the hundred, &c. unless to a pound in the same county within three miles distance, on pain of 5 *l.* and treble damages.And no single distress of goods or cattle shall be impounded in several places to enforce several replevies, on pain of 5 *l.* and treble damages.And none shall take above 4*d.* for impoundage of any one distress, on pain of 5 *l.* above the money so taken.But a lord of a manor, in a distress for his services, may impound upon his manor, tho' it be in another county: for it is out of the mischief, tho' it be within the words of *st.* of *Marlb.* 4. 22 *Ed.* 4. 11. *2 Inst. 106.*So, if a distress be out of the county, trespass does not lie; but he ought to have an action on the statute. *R. per three J. 3 Lev. 48.*So, goods distrained ought to be removed within a convenient time. *Mod. Ca. 215.*If the distress be for rent, they shall be removed immediately. *Semb. Mod. Ca. 215.*If the party quits the possession after the distress made, before removal, the retaking shall not be deemed a rescue. *Mod. Ca. 216.*

But

But by the *st. 2 W. & M. 5.* corn or hay distrained shall not be removed, &c. from the place where seized, but kept there till relieved, or sold.

[By the *st. 11 G. 2. 19.* distresses for rent may be impounded, secured, and sold on the premises.]

(D 2.) *Parco fracto.* *When, and by whom it lies.*] If cattle or goods distrained be put into a lawful pound, and the owner or a stranger takes them out of the pound, a *parco fracto* lies. *F. N. B. 100. E.*

And tho' a servant made the distress, the master shall have the *parco fracto.* *F. N. B. 100. E.*

So, if cattle are impounded in the soil of a stranger, with his consent, the distrainer, and not the owner of the soil, shall have the *parco fracto.* *F. N. B. 100. E.*

A *parco fracto* lies, tho' the distress and impounding were without cause. *R. Bend. 30. 1 Sal. 247. 1 And. 31. 1 Rol. 673. l. 55.*

But if the lord of a manor, or the owner of the soil, put out the cattle, a *parco fracto* does not lie; but an action on the case. *Per Jon. Win. 81.*

So, if the distress was without cause, and the owner takes them from the pound where the door was unlockt, a *parco fracto* does not lie. *1 Rol. 647. l. 5. Co. L. 47. b.*

The writ lies *vi & armis.* *F. N. B. 100. F.*

But the writ need not shew to whom the property of the cattle or goods belongs. *F. N. B. 100. F.*

Nor, what kind of cattle they are. *F. N. B. 100. F.*

So, a declaration in a *parco fracto* need not shew a title to make the distress. *1 Sal. 247.*

To a *parco fracto* the defendant shall plead *not guilty.*

If he says, that being lord of the soil he broke the lock to put in others of his own, it is ill: for it amounts to the general issue: for if the cattle did not escape, it is not a breach of the pound. *Win. 80.*

(D 3.) *Rescous.* *When it lies.*] So, if a distress be rescued before the impounding, the party who made the distress may have a writ of *rescous.* *F. N. B. 101. C.*

If the distress was by a servant, the master shall have *rescous.* *F. N. B. 101. F.*

Rescous shall be, where a man rescues, or sets at large, goods lawfully distrained. *Co. L. 160. b. Vide Rescous (A).*

If cattle distrained go into the house of the owner, and he upon demand refuses delivery, it will be a *rescous.* *Co. L. 161. a.*

(D 4.) *Remedy for a rescous.*] By *st. 2 W. & M. 5.* on a pound-breach or *rescous* of goods distrained for rent, the person grieved, by special action on the case, may recover treble damages, and costs of suit against the offender, or owner of the goods, if they be found to come to his use or possession. *Lut. 213. Vide Pleader (2 S 29.) [Vide the st. 11 G. 2. 19. s. 10.]*

[It is no answer to an action on this stat. that the rent and demand were tendered after the distress and impounding. *Firth v. Purvis, B. R. M. 34 Geo. 3. 5 T. R. 432.*]

So,

So, by the common law, the master, for whom the distress was made, may have remedy by writ of *rescous*. *F. N. B.* 101. *F. Vide Rescous* (C).

So, the party may maintain an action on the case on the *ft.* 2 *W. & M.* tho' no notice of the distress was given to the lessee: for notice signifies nothing to a wrong-doer. *R. Lut.* 214. *Vide Pleader*, (2 S 29.)

(D 5.) *When rescous does not lie.*] But goods cannot be rescued before they are in the possession of him who distrains: for if he is prevented from making the distress, an action on the case lies, not *rescous*. *F. N. B.* 102. *F.*

So, if he who takes the distress, quits the possession of the goods, the taking of them will not be a *rescous*. *R. Mod. Ca.* 215.

So, a man may make *rescous*, if his cattle or goods be taken without cause; or, if he be frequently distrained, so that he cannot manure his land, he shall have an *assise de sovent distress*. 4 *Co.* 11. *b.*

As, if the lord distrains for rent when nothing is in arrear. 4 *Co.* 11. *b.* *Co. L.* 160. *b.*

So, if he distrains for rent due by encroachment, the tenant may tender so much as is due of right, and make *rescous* if it be refused. 4 *Co.* 11. *b.*

So, if the tenant tenders the rent before distress, which is refused, and the lord afterwards distrains, the tenant may make *rescous*. *Co. L.* 160. *b.* 2 *Inst.* 107.

So, if the lord distrains out of his fee, the tenant may make *rescous*. *Co. L.* 161. *a.* *Vide ante*, (A 3.)

Or, in a highway, or place where by law he ought not to distrain. *Co. L.* 160. *b.* *Vide ante*, (A 3.)

So, if the cattle of a stranger are taken, the owner may make *rescous*. *Co. L.* 160. *b.*

Or, beasts of the plough, &c. which ought not to be distrained. *Co. L.* 161. *a.* *Vide ante* (B 1, &c.)—(C).

Or, any thing not distrainable by common law, or statute. *Co. L.* 161. *a.*

So, a *rescous* may be made upon a distress for a rent-charge, as well as for a rent-service, if the distress is not lawful. *Co. L.* 160. *b.*

Or, upon a distress for an amercement, which does not appear to be lawful.

As, if it be upon a presentment in a leet for diverting a highway; for it cannot be diverted, tho' it may be stopped or obstructed: but to divert is proper for a water-course. *R. 1 And.* 234.

(D 6.) But a Distress shall not be used.

So, a distress ought not to be abused; for that makes him, who distrained, a trespasser *ab initio*. *Vide Trespass*, (C 2.)

As, if he drives it to another county, and there sells it. *R. 1 And.* 65.

If a horse three times leaps over the pound, for which he ties the horse to a stake in the pound, and the horse chokes himself by the rope. 1 *Rol.* 673. *l.* 26.

If a man works cattle distrained. 1 *Leo.* 220.

If a man distrains an hide, and for preservation, tans it. *R. Cro. El.* 783. 2 *Rol.* 562. *l.* 25.

If

If he distrains a hoghead of beer, and tastes the liquor. *R. Mod. Ca. 215, 6.*

So, if a man milks a cow; tho' it be for the benefit of the cow. *R. 1 Rol. 673. l. 32. Noy, 119. 1 Leo. 220. Vide 2 Cro. 148. Semb. cont.*

If he cords a trunk for greater security, being informed that there are in it things of value. *D. 1 Vent. 37.*

But using for the benefit of the owner shall be allowed: as, if he scours armour taken for a distress. *Vide Cro. El. 783.*

So, if cows, horses, &c. are taken in *withernam*, they may be milked or worked in a reasonable manner: for they are delivered to the party in lieu of his own cattle. *R. 1 Leo. 220.*

And when the cattle are restored, the labour shall be for their diet. *Ow. 46.*

So, if several barrels of beer are distrained for rent, and the distrainer takes the liquor of one; he shall be a trespasser only for that barrel. *Mod. Ca. 226.*

[By the 11 G. 2. 19. *f.* 19, 20. distresses for rent shall not be deemed unlawful for any irregularity, or unlawful act afterwards done by the party distraining, nor the party deemed a trespasser *ab initio*: but the parties grieved thereby may recover satisfaction for the special damage and no more, in an action of trespass, or on the case, and the plaintiff recovering shall be paid his full costs of suit. But no tenant shall recover in such action, if tender of amends hath been made by the party distraining.]

(D 7.) Nor sold.

(D 7.) *By the common law.*] So, by the common law, a distress for rent cannot be sold.

Yet, by the common law the king might sell it:

But not the cattle of an under-lessee of his tenant after the rent incurred: tho' they might be distrained. *2 Rol. 159. l. 45.*

So, a distress for a fine, or amerciamment, in a leet the lord may sell, or impound, at his pleasure. *8 Co. 41. b.*

So, by custom, he may sell upon a *distringas pro certo lete*, or for an amerciamment in a court-baron. *R. 1 Sal. 379.*

So, where a statute gives an execution for a penalty by distress, without more, the officer may sell. *R. 2 Jon. 25. R. 1 Sal. 379.*

(D 8.) *When by statute.*] But now, by the *st. 2 W. & M. 5.* if goods be distrained for rent due, on demise, or contract, and the owner does not replevy them in five days next after such distress taken, and notice thereof with the cause of taking, left at the chief mansion, or other most notorious place of the premises charged with the rent, then after such distress, notice and five days, the distrainer, with the sheriff, under-sheriff, or constable of the hundred or place, may cause the goods to be appraised by two sworn appraisers, (whom the sheriff, under-sheriff, &c. may swear,) and afterwards may sell the same for the best price that can be gotten, towards satisfaction of the rent, and charges of such distress, appraisement, and sale, leaving the overplus, if any, in the hands of the sheriff or constable for the owner's use.

If a distress be for rent, notice of it ought to be given.

[But in the notice, it is not necessary to mention, *when* the rent became due for which the distress was made. *Doug. 281.*]

And

And all goods distrained, except corn and hay, ought to be removed immediately. *R. Mod. Ca. 215.*

But notice may be given to the tenant in person, as well as left at his house, &c. *R. T. 7 W. 3. B. R. inter Walter and Rumball, 1 Sal. 247. (Vide 1 Ld. Ray. 54.)*

And if they are not the goods of the tenant himself, notice to the owner of the goods is sufficient. *R. 4 Mod. 394, 5. in trover, or other action for the goods, by the owner. 1 Sal. 247.*

But if the tenant had brought a *replevin* for the goods, notice to the owner had not been sufficient, without notice also at the mansion of the tenant, or other notorious place upon the premises. *1 Sal. 247. (Vide 1 Ld. Ray. 54.)*

So, if a distress be upon land within two hundreds, the constable of the hundred, where the distress was impounded, may swear the appraisers. *R. 4 Mod. 395. 1 Sal. 247. (Vide 1 Ld. Ray. 55.)*

Yet a distress cannot be conveyed to a remote county. *1 Sal. 247.*

A sale by the distrainer or his servant is sufficient, tho' the sheriff, &c. be not present at the sale. *R. T. 7 W. 3. B. R. inter Walter and Rumball. Vide 4 Mod. 390.*

And a sale for a price at which they were appraised, shall be intended the best price, if the contrary does not appear. *R. inter Walter and Rumball, 4 Mod. 391. (Vide 1 Ld. Ray. 55.)*

So, now by the *st. 4 G. 2. 28.* remedy shall be by distress and sale, for rents-seck, of assise, and chief-rents, paid three years in twenty years before that session of parliament, or afterwards created, as for rent reserved on lease.

[By the *st. 11 G. 2. 19.* notice of the place where goods distrained are deposited shall within one week be given to the lessee, or left at his last place of abode; and if after a distress for rent, taken of corn, &c. growing, &c. the rent, and costs of the distress be paid, or tendred, the distress shall cease, and the corn, &c. shall be delivered to the tenant.]

And by the same *stat.* distresses may be impounded, appraised, and sold on the premises.

[A distress cannot be supported on a rent-seck, but on the authority of this statute, and therefore the avowry must state, that the rent had been duly answered, or paid for the space of three years, within the space of 20 years before the first day of the session of parliament, when the statute passed. *Dist. per Buller J. Doug. 628.*]

(D 9.) *When not.*] Yet by *st. 2 W. & M. 5.* if distress and sale shall be made for rent, when no rent is due, the owner of the goods distrained may by trespass, or action on the case against the distrainer, his executor or administrator, recover the double value of the goods distrained and sold, with full costs. *Vide 4 Mod. 231.*

And the plaintiff need not allege a demise in form. *R. 4 Mod. 232.*

And it is sufficient to say, that the defendant took the goods *nomine districtionis*. *R. 4 Mod. 232.*

Replevin.

When *replevin* lies upon a distress, *vide* in *Replevin*. — *Pleader*, (3 K 1, &c.)

Vide more of title *Distress*, in *Bye-Law*, (D 2.) — *Pleader*, (2 S 19. — 3 M 25.) — *Rent*, (D 3, &c.) — *Seisin* (E). — *Sewers*, (E 6.)

DISTRIBUTION.

Distribution of a Bankrupt's Estate.

Vide Bankrupt, (D 30, 31.)

Distribution of an Intestate's Estate.

Vide Administration (H). — *Chancery*, (3 D 1, &c.)

Distributive Words.

Vide Parols, (A 13.)

DISTRINGAS.

Vide Enquest, (C 6.) — *Process*, (D 7.)

DISTURBANCE.

Vide Action upon the Case for a Disturbance. — *Pleader*, (3 I 6.) — *Quare Impedit* (D).

DIVINE SERVICE.

Vide Sacraments (B—E).

DIVORCE.

Vide Abatement, (H 43.) — *Baron and Feme*, (C 1, &c.) — *Dower*, (A 1, 2.) — *Pleader*, (2 Y 12.)

DOGS.

Vide Chase (M).

DONATIVE.

(A) The Original of it, &c.

TH E king founds a church, hospital, or chapel, and exempts it from the jurisdiction of the ordinary; this shall be a donative. *Co. L.* 344. a.

So, if he founds it, tho' he does not exempt it by express words. *Co. L.* 344. a.

So, if a subject, by the king's licence, founds a church, or chapel, to be exempt from the jurisdiction of the ordinary, it shall be a donative: and this was the original of all donatives. *Co. L.* 344. a.

Originally all abbies and priories were donative.

So, all the bishoprics in *England* were donative by the delivery of a crozier and ring, till by a charter 5 June 17 *Joh.* they were made eligible. *Co. L.* 344.

A prebend, chantry, and chapel may be donative. *Co. L.* 344. a.

And, at this day, a parochial church of the king's foundation may be donative, and shall have the cure of souls. 2 *Roll.* 341. l. 20.

So,

So, if it be of the foundation of a subject. *Semb. Co. L. 344. a. 2 Rol. 341. l. 30. 2 Cro. 63.*

But generally, a donative has not *curam animarum*, where it has not presentation and institution. *Per Twissd. and Keeling, 1 Mod. 11.*

A donative is exempted from the jurisdiction of the ordinary. *Co. L. 344. a.*

And therefore, the incumbent need only have the donation from the patron, without admission or institution by the ordinary. *Co. L. 344. a. Dav. 46. b. 2 Cro. 63.*

And a lapse does not incur for want of a donation, if it be not specially provided in the foundation. *Co. L. 344. a. 2 Cro. 517.*

[But by *st. 1 G. 1. st. 2. c. 10. s. 6.* such donatives as by that statute receive the benefit of queen Anne's bounty, shall be subject to lapse, &c. in the same manner as presentatives, *s. 7.* provided that tho' the lapse be incurred, yet if the person entitled shall nominate before advantage taken of the lapse, his nomination shall be good. *Vid. 1 Term Rep. 396.*]

The ordinary cannot visit; but the patron may. *Co. L. 344. a. Dav. 46. b.*

If the king be patron, he visits by his chancellor. *Co. L. 344. a. Vide Visitor, (A 2.)*

If a subject, he visits by commissioners. *Co. L. 344. a. 2 Rol. 341. l. 30. Vide Visitor, (A 4.)*

So, the patron solely may deprive for heresy, or other offence. *R. Tel. 61. 2.*

The patron solely shall inquire of the reparation and ornaments. *1 Mod. 90.*

If the bishop intermeddles with that which belongs to the patron, a prohibition shall go. *1 Mod. 90.*

Yet the incumbent ought to be *infra sacros ordines*; for his function is spiritual. *Co. L. 344. a.* if the donative has a cure. *2 Rol. 341. l. 35. R. Tel. 61.*

[The incumbent of a donative must be 23, in deacon's orders, subscribe, read, &c. as for any other benefice: but it is not necessary for him to prove the performance of them. *Powell v. Milburn, M. 13 G. 3. 3 Wils. 355.*]

And if he be disturbed, the patron shall have a *quare impedit presentare ad ecclesiam*, and shall count upon the special matter. *Co. L. 344. a. Vide Pleader, (3 l 6.)*

So, he may be cited to take a licence from the bishop to preach; and a prohibition does not go. *R. 1 Mod. 90. 2 Keb. 876.*

[He need not have a licence to preach, *Powell v. Milburn, M. 13 G. 3. 3 Wils. 355.*]

[In the case of a donative, the party is in full possession immediately on his nomination without the bishop's licence, and he may maintain an action for money had and received against any person who takes the profits. *Dist. per Ashhurst J. 1 Term Rep. 403.*]

Or, for marrying there without licence. *R. per three J. 1 Sid. 432. 1 Mod. 22.*

So, if he presents to a donative by simony, it will be within the *stat.* *31 El. 6. R. Cro. Car. 331.*

But if it be doubted, whether it be donative or presentative, and any sues for induction, a prohibition does not go: for till induction

the incumbent has no remedy to try the right; and if it be a donative, the induction is null. *R. Cro. El. 653.*

So, if a patron presents his clerk to a donative, to the ordinary, who admits and institutes him; it shall never be donative afterwards, but always presentative. *Co. L. 344. a. 2 Rol. 342. l. 45. 2 Cro. 63.*

But a presentation to a donative by a stranger, and admission and institution upon it, do not make the church presentative. *Co. L. 344. a. 2 Rol. 342. l. 50.*

Or, to a donative created by the king's letters patent. *Per two J. Sal. 541.*

If an incumbent of a donative resigns his church to the patron, the property is divested out of him, without other ceremony. *R. 2 Cro. 63. Yel. 61. Mo. 765.*

And if there be two patrons, if he resigns to one of them, if the other assents. *R. 2 Cro. 63.*

So, if he resigns to one of the patrons and a stranger. *R. Yel. 61.*

A resignation in the words of the donation, as, *of his church*, amounts to a resignation of the whole. *R. 2 Cro. 63. Yel. 61.*

But if the patron refuses to make a donation when the church is parochial, the ordinary may compel him to make it: for he is not exempt, tho' the church is. *Per four J. Yel. 61.*

[If *A.* seised of advowson of donative, the church becomes void, *A.* dies, (the church still void,) having first made his will and *B.* executor, it descends to the heir at law: was it presentative, the executor would have title. *Reppington v. Tamworth School, P. 3 G. 3. 2 Wilf. 150.*]

DOUBLE DECLARATION.

Vide Pleader, (C 33.)

DOUBLE PLEA.

Vide Pleader, (E 2.)

DOUBLE REPLICATION.

Vide Pleader, (F 16.)

DOWER.

(A) Dower by the Common Law.

(A 1.) What Wife shall be endowed.

DOWER is by the common law, by custom, *ad ostium ecclesie*, *ex assensu patris*, or *de la plus beale*.

Dower by the common law is, when a woman takes an husband seised in fee, in general tail, or as heir to a special tail, after the death of her husband, (if she be then nine years old,) she shall be endowed of a third part of all lands and tenements of which her husband was seised during the coverture, to hold in severalty for her life. *Every*
Lit. f. 36.

Every wife regularly shall be endowed.

Tho' she was a *nief* before marriage. *Co. L. 31. a.*

Tho' she was divorced *à mensa & thoro*. *Co. L. 33. b.* or divorceable *à vinculo*, if the husband died before the divorce. *Co. L. 33. a.*

Tho' the wife was attainted for felony, &c. if she was afterwards pardoned before the death of her husband. *Co. L. 33. a. Vide post. (F 1.)*

Tho' her husband was an idiot, or *non compos*, or outlawed. *Co. L. 31. a.*

Attainted for felony, trespass, *præmunire*, heresy, &c. *Co. L. 31. a.*

Tho' the husband was a villein to a common person, if the husband died before the entry of his lord. *Co. L. 31. a.*

So, where the husband was attainted for treason, after the attainder reversed by error. *Mo. 639.*

(A 2.) What not.

But if the wife of a subject be an alien, she shall not be endowed. *Co. L. 31. b. Vide Alien, (C 1.)*

Nor, the wife of an alien. *Co. L. 31. a.*

Nor, the wife of the king's villein. *Co. L. 31. a.*

So, if an alien, after alienation by her husband, be made a denizen, she shall not be endowed. *Co. L. 33. a.*

So, if the marriage be divorced *à vinculo*, the woman shall not be endowed. *Co. L. 33. b. 1 Rol. 681. R. 47 Ed. 3. pl. 78.*

Nor, if a wife elopes from her husband, and be not reconciled. *Vide post. (F 2.)*

So, the woman shall not be endowed, if it be not a lawful marriage: for it shall be tried by the bishop. *1 Leo. 53.*

[A marriage celebrated in *Scotland* (but not between persons who go thither for the purpose of evading the laws of *England*) will entitle the woman to dower in *England*. *Ilderton v. Ilderton, T. 33 G. 3. 2 H. Bl. 145.*]

[The lawfulness of such a marriage may be tried by a jury. *Ibid.*]

So, if the husband be attainted for high treason, his wife shall not be endowed. *Co. L. 31. a.*; for the *st. 1 Ed. 6. 12.* which allows dower to the wife of a person attainted of treason, is repealed as to this by the *st. 5 & 6 Ed. 6. 11. Co. L. 37. a. 41. a. Vide post. (F 1.) Vide Forfeiture, (B 2.)*

Tho' the treason was committed after the title to dower commenced. *Co. L. 31. a. 1 Leo. 3.*

So, a Jew, who is not converted to Christianity with her husband, shall lose her dower. *Co. L. 32. a.*

So, the wife shall not have dower, if the husband be attainted for treason, tho' afterwards pardoned. *1 Leo. 3.*

So, if a husband takes a wife, living his former wife; the second marriage is null, and the wife shall not be endowed. *Perk. f. 304.*

So, if a wife takes a second husband in the life of the former, she shall not be endowed. *Perk. f. 305.*

So, if a woman be contracted to a husband who dies before the marriage is completed. *Perk. f. 306.*

(A 3.) At what Age.

A wife shall be endowed if she be of the age of nine years at the death

death of her husband; tho' she cannot assent to the marriage before the age of twelve years. *Co. L. 33. a.*

Tho' the husband was under the age of nine years. *Co. L. 33. a. 40. a.*

Tho' the husband aliens the land before the wife attains her age of nine years. *Co. L. 33. a.*

Tho' the wife was above the age of 100 years; so that by possibility she could not have issue. *Co. L. 40. a. 1 Rol. 675. l. 11.*

But a wife shall not have dower by the common law, if she be under the age of nine years at the death of her husband. *Co. L. 33. a. Vide 1 Rol. 675. l. 15.*

Yet a wife may have dower *ex assensu patris*, or *ad osium ecclesie* before such age. *Co. L. 37. a.*

(A 4.) Of what Seisin.

A wife shall be endowed where the husband had a seisin in law, as well as where he had an actual seisin. *Co. L. 31. a.*

And therefore, if after a descent of land the husband dies before entry, his wife shall be endowed. *Co. L. 31. a.*

So, a wife shall be endowed, tho' the seisin did not continue till the death of the husband: as, if a man seised in fee takes a wife, and then sells, or aliens his lands to another and his heirs. *Co. L. 32. a.*

So, a wife shall be endowed, tho' the estate of her husband be evicted by an elder title, after *cesser* of the eviction: as, if the grandfather enfeoffs the father, and afterwards the wife of the grandfather recovers dower from him, and dies; the wife of the father shall be afterwards endowed of the same land. *Co. L. 31. b.*

So, if land descends to the father, who dies, and his wife is endowed; if the wife of the grandfather recovers her dower against her, and afterwards dies, the wife of the father shall have the land after her death. *Co. L. 31. b.*

So, the wife shall be endowed, where the estate of the husband is evicted by covin: as, if a man recovers against him by his reddition, without right. *2 Inst. 349.*

So, by the *st. W. 2. 4.* if there be a recovery by default, and he cannot shew that the recoveror had a right. *2 Inst. 349.*

So, a wife shall be endowed where the husband had the estate, tho' it was upon trust to give to another: as, if a feoffment be to *A.* upon condition that he enfeoff *B.*; the wife of *A.* shall be endowed. *1 Rol. 678. l. 36.*

If a bargain and sale be to *A.* in fee, in consideration that he redemise to the bargainor, upon a condition to be void; tho' it be in the nature of a mortgage, yet the wife of *A.* shall be endowed: for it ought to be a bargain to two if he would avoid the dower of the wife; and therefore equity will not give relief. *Certified to Chancery, Cro. Gar. 191.*

(A 5.) Of what, not.

But a wife shall not be endowed, where her husband had seisin only for an instant, or as an instrument: as, if *cestuy que use*, after the *st. 1 R. 3.*, and before the *st. 27 H. 8. 10.* had made a feoffment, his wife would not be endowed. *Co. L. 31. b.*

So,

So, if a feoffment be now to *B.* and his heirs, to the use of *C.* and his heirs: the wife of the feoffee shall not be endowed.

Nor, the wife of the conusee of a fine who renders the estate to the conusor. *Co. L. 31. b. 2 Co. 77. a.*

If a copyhold escheats to the lord of a manor, who afterwards grants it by copy; his wife shall not be endowed of it. *R. 4 Co. 24. a.*

If a mortgagor pays the money at the day, the wife of the mortgagee shall not be endowed. *Cro. Car. 191.*

Or, if he redeems by consent after the day. *2. 1 Rol. 679. O.*

So, if tenant for life makes a feoffment; tho' he has a fee, who gives a fee, his wife shall not be endowed: for the same instant that he had a fee, it was out of him. *2 Cro. 615. 1 Rol. 676. l. 45.*

So, if a joint-tenant makes a feoffment; tho' the estate was severed for an instant. *2 Cro. 615.*

So, if tenant in special tail makes a feoffment, with a letter of attorney &c. and then takes a wife, and afterwards livery is made. *R. 2 Cro. 615. 1 Rol. 676. l. 50.*

So, a wife shall not be endowed, where the seisin of her husband is wholly defeated: as, if land descends to *A.* who enters, and then his mother recovers dower from him, and afterwards dies; the wife of *A.* shall not be endowed: for the seisin of *A.* was entirely defeated. *Co. L. 31. a.*

If a feoffor enters upon a feoffee for a condition broken; the wife of the feoffee shall not be endowed: for his seisin is defeated by the re-entry of the feoffor. *Perk. f. 311, 312. 1 Rol. 474. O.*

If land taken in exchange, or allotted upon partition, be afterwards recovered in value, upon eviction of the land given in exchange, &c. the wife shall not be endowed of the land recovered. *Perk. f. 309, 310.*

So, if the seisin of the husband be evicted by a recovery upon title, his wife shall not be endowed. *2 Inst. 349.*

So, if tenant in special tail makes a discontinuance, and takes back an estate in fee, and afterwards takes another wife, and dies, and the issue in tail enters; the second wife shall not be endowed: for the seisin of the fee is defeated by the remitter. *Co. L. 31. b. Dy. 41. a.*

Nor, where the estate of the husband is determined: as, if a feoffment, or covenant to stand seised, &c. be to the use of *B.* and his heirs till *C.* marries; *B.* dies, his heir takes a wife, and dies, and then *C.* marries; the wife shall not be endowed. *Dub. 1 Rol. 676. F.*

So, a wife shall not be endowed, where her husband had not seisin in fact, or in law, during the coverture. *Co. L. 31. a.*

So, if a bargain and sale be upon condition, and the condition be broken, and the bargainor dies before entry; his wife shall not be endowed: for tho' the use reverts without entry, yet by the *st. 27 H. 8.* the use is incorporated with the land, and without entry he is not seised of the land, and therefore his wife shall not be endowed. *6 Co. 34. a.*

So, a wife shall not be endowed of land given in exchange, and also of land taken in exchange: but she has her election to have the one or the other. *Co. L. 31. b.*

(A 6.) Of what Estate.

A woman shall be endowed, where her husband was seised in fee, in tail general, or as heir in special tail. *Lit. f. 36.*

And generally, in every case, where the issue which the husband may have by his wife by possibility may inherit, as heir to the husband to such estate in the tenements as the husband has, his wife shall be endowed. *Lit. f.* 53.

And therefore, where land is given to *A.* and the heirs of his body upon *B.* his wife begotten; tho' *A.* be donee in special tail, *B.* shall be endowed: for her issue may inherit the same estate as heir to the husband. *Lit. f.* 53.

So, if an estate be limited to *A.* for life, remainder immediately to him in fee, or in tail, without any mesne remainder; his wife shall be endowed; for he has both estates in him. *1 Rol. 677. l. 10. 25. Perk. f.* 338.

[If *A. senior & ux.*, and *A. junior & ux.*, covenant to levy a fine to the use of the conusees, which is done; and the conusees by lease and release convey to the use of *A. senior* for life, and to his wife if she survive, then to *A. junior*, (his son and heir-apparent,) remainder to his first and other sons in tail-male, remainder to his daughters in tail, remainder to *A. senior* in fee, with a power to *A. junior* to settle on any other wife; *A. senior & ux.* die without other issue, in the lifetime of *A. junior*; his wife dies; he marries again, and dies without issue; his wife is entitled to dower in these lands. *Hooker v. Hooker, H. 7 G. 2. B. R. H. 13.*]

So, if there be a mesne remainder for years; but *cesset executio* during the term. *Perk. f.* 336. *R. 1 Sal. 254. Lut. 729.*

So, if there be a mesne remainder for life, who surrenders his estate to the tenant for life. *1 Rol. 677. l. 18.*

Tho' the surrender be upon condition: for the estate is gone till the condition is broken. *1 Rol. 677. l. 20.*

So, if an estate be to *A.* for life, remainder to *B.* for years, remainder to *A.* in tail or in fee; the wife of *A.* shall be endowed. *R. 1 Sal. 254. Lut. 733.*

So, if an estate be limited to *A.* for years, remainder to *B.* in tail, or in fee; the wife of *B.* shall have dower of the reversion or remainder. *Lut. 733.*

So, if a man makes a lease for years, rendring rent, and takes a wife, she shall be endowed of the reversion and a third part of the rent. *Co. L. 32. a. R. 1 Rol. 678. l. 15.*

Yet, if no rent be reserved upon the lease for years, execution shall stay during the term. *R. 1 Rol. 678. l. 20.*

So, if a term be to *A.*, remainder to *B.* in tail, &c. though the term be upon trust to attend the inheritance, the wife of *B.* shall not have dower till the expiration of the term. *R. Ca. Parl. 71.*

And if *B.* sells, and the term is assigned to defend the purchaser; *Chancery* will not decree the trust of the term to the wife for a third part. *R. Ca. Parl. 69.*

But a term upon trust to attend the inheritance shall be decreed in equity to tenant in dower, against the heir at law. *R. Ca. Parl. 70.*

So, if the husband has a defeasible estate in fee, tail, &c. his wife shall be endowed till his estate be defeated. *1 Rol. 677. l. 27. 40. Vide ante, (A 5.)*

As, if husband and wife, lessees for life, make a surrender to the lessor, which is avoidable by the wife lessee; yet the wife of the lessor shall be endowed till the surrender be defeated. *1 Rol. 667. l. 30. 45.*

So, the wife of a disseisor, till the disseisin be avoided. 1 *Roll.* 677.

l. 47.

So, if husband and wife, and *A.*, be tenants in common, and the husband dies before partition; the wife shall be endowed of his part against his heir. *R.* 3 *Lev.* 84.

(A 7.) Of what, not.

But if there are joint-tenants in fee, and one dies; his wife shall not be endowed: for the estate survives. *Co. L.* 31. *b.*

So, if the husband be seised in special tail; the second wife shall not be endowed: for the issue of the second wife cannot by possibility inherit the same estate as heir to the husband. *Lit. f.* 53.

Tho' the issue of the wife by possibility may inherit to him: as, if tenant in tail general makes a feoffment, and takes back an estate to him and his wife, and the heirs of their bodies; the wife dies, and the husband takes another wife, and dies; the second wife shall not be endowed: for during his life he was seised in special tail, tho' the issue by the second wife by possibility might inherit. *Co. L.* 31. *b.*

So, if the husband has only an estate for life, his wife shall not be endowed.

Tho' the estate be to him and his heirs for the life of *B.* 1 *Roll.* 676. l. 43. *D. cont.* 1 *Sand.* 261. *Vide Estates.*

Tho' the inheritance be also to the tenant for life, if it be not executed in him: as, if it be to *A.* for life, remainder to *B.* for life, or in tail, remainder in fee, or in tail to *A.*; the wife of *A.* shall not be endowed. *R.* 1 *Roll.* 677. l. 15. *Perk. f.* 333. 335. 1 *Sal.* 254.

So, if an estate be granted to *A.* and *B.*, and to the heirs of *B.* who dies, his wife shall not be endowed; for the fee was not entirely executed during the life of *A.* *Perk. f.* 334.

So, if the remainder-man for life, or in tail, grants his estate to tenant for life: for it was *quasi* a reversion in him in remainder. 1 *Roll.* 677. l. 5.

So, if there be a remainder for the life of tenant for life upon trust to preserve contingent uses. *R.* 3 *Lev.* 437.

So, if the husband has only a term for years, his wife shall not be endowed by law or equity. *Ca. Parl.* 72.

So, if *A.* be seised in trust for *B.* in fee, &c. the wife of *B.* shall not be endowed in law or equity. *Ca. Parl.* 71.

[If land is conveyed to trustee and his heirs, to the use of him and his heirs, to stand seised to the use of the heirs of *A.*, and *A.* devises this trust-estate to *B.* who dies, *B.*'s wife is not dowable of it. *Attorney-General v. Scott*, *M.* 9 *G.* 2. *C. T. T.* 138.]

(A 8.) Of what Lands and Tenements.

A wife shall be endowed of the third part of all such lands and tenements of which her husband was seised during the coverture.

And therefore, a wife shall be endowed of a rent-service, charge, or feck. *Co. L.* 32. *a.*

Of common certain, appendant, or appurtenant. *Co. L.* 32. *a.*

And it shall be intended common appendant, if it does not appear to the contrary. *R.* *Jon.* 315.

Of tithes, *vide Co. L.* 32. *a.*

So, a wife shall be endowed of the chief mansion, or messuage of her husband. *Co. L.* 31. *b.*

Tho'

Tho' it be a castle : for *Mag. Charta*, 7. shall be understood only of a castle for defence of the realm. *Co. L.* 31. *b.*

Tho' it be the capital seat, where her husband was a baron of the realm : for *caput baronie* is understood of the principal seat of feudal baronies given by the king to be held for the defence of the realm. *R.* 1 *Sal.* 253. 3 *Lev.* 401. 5 *Mod.* 65. *Skin.* 592.

[Dower does not lie of a tenement. *Kent v. Kerry*, *P.* 11 *G. Str.* 625.]

[It lies of a messuage or workshop. *Bern v. Bern*, *M.* 8 *G.* 2. *B. R. H.* 72.]

So, she shall be endowed of entire tenements, tho' it cannot be by metes and bounds ; as, of a mill ; and she shall have the third toll-dish, or the whole mill every third month. *Co. L.* 32. *a.*

So, of a villein ; and shall have his labour every third day, week, or month. *Co. L.* 32. *a.*

Of the profits of a fair, or office. *Co. L.* 32. *a.*

Of stallage, a dovecote, a piscary ; and shall have the third fish, or *tergium jactum retis*. *Co. L.* 32. *a.*

Of an advowson ; and shall have the third turn. *Co. L.* 32. *a.*

[The shares in the navigation of the river *Avon*, under the *stat.* 10 *Anne*, held by *M. R.* to be real estate, and subject to dower. *Buckeridge v. Ingram*, 2 *Ves. jun.* 652.]

(A 9.) Of what, not.

But the queen shall not be endowed of the crown of *England*. 1 *Rol.* 676. *l.* 3.

So, a wife shall not be endowed of common in gross uncertain. *Jen.* 315.

So, by the common law, a wife shall not be endowed of chattels, tho' by the civil law she may. 1 *Rol.* 675. *l.* 40.

(A 10.) When Title to Dower commences.

To a title to have dower three things are necessary : marriage, feisin, and the death of the husband. *Co. L.* 31. *a.* 32. *a.*

(A 11.) Assignment of Dower ; Quarentine.

By the *st. Mag. Charta*, 9 *H.* 3. 7. *Vidua maneat in capitali messuagio mariti sui per 40 dies, infra quos dos ei assignetur* : and this term of 40 days is called her quarentine. *Co. L.* 32. *b.* 34. *b.* 2 *Inst.* 16.

But by the same *statute*, *si domus illa sit castrum, domus competens provideatur in qua potest morari donec dos ei assignetur ; & habeat rationabile estoverium suum interim*.

And therefore, the wife shall have quarentine only for 40 days. *Co. L.* 32. *b.*

Tho' before the Conquest she would have had it for a year. *Co. L.* 32. *b.*

The quarentine shall be allowed in the principal messuage of the husband, of which she is dowable. 2 *Inst.* 17.

Tho' it be called a castle ; if it be not maintained for war, but for habitation. *Co. L.* 32. *b.* 34. *b.* 2 *Inst.* 17.

Tho' it be the principal mansion of a baron, or peer of the realm. *R.* 3 *Lev.* 401. 5 *Mod.* 65. 1 *Sal.* 253.

And

And the wife during her quarentine shall have sustenance *de bonis viri*. 2 *Inst.* 17.

And if she be ousted of her quarentine, the wife shall have a writ to the sheriff, which gives a commission to him to make process against the defendant returnable in two or three days, and put her into possession. *Co. L.* 34. b. 2 *Inst.* 17.

But the forty days after the death of the husband, allowed for quarentine, are inclusive of the day of his death, and there are but 39 days after. 2 *Inst.* 17.

So, the wife shall lose her quarentine, if she marries angher. 2 *Inst.* 17. *Co. L.* 32. b. 34. b.

So, a wife cannot kill the oxen of the husband for her sustenance. *Vide* 2 *Inst.* 17.

So, the wife shall not have her quarentine in a house which is a castle maintained for defence of the realm. *Co. L.* 32. b. 34. b. 2 *Inst.* 17.

Nor, in that which is *caput baroniae*, which usually was a castle. 2 *Inst.* 17.

(B) Dower by Custom.

BY custom, a woman may be endowed of a moiety, the whole, or but a fourth part of the lands, of which her husband was seised. *Lit. f.* 37. *Co. L.* 33. b. 21 *Ed.* 4. 53, 4. *Vide Copyhold*, (K 2.)

So, by custom, a woman may be endowed of the profits of mines of tin, &c. *Dal.* 2.

(C) Dower *ad Ostim Ecclesiae*.

SO, a man of full age might endow his wife *ad ostium ecclesiae*, vel *monasterii*, after affiance of the whole or part of his land; and there openly declare the quantity and certainty of the land which she shall have. *Lit. f.* 39.

And in such case the wife shall enter after the death of her husband, without the assignment of any one. *Lit. f.* 39.

And such endowment shall be good without deed: for he cannot make a deed to his wife. *Co. L.* 34. a.

Vide *Co. L.* 34. b. 35. a. 36. a. &c. *Lit. f.* 41, 42, &c.

Dower *ex Affensu Patris*.

For dower *ex assensu patris*, *vide* *Lit. f.* 40, 41, 42, &c. *Co. L.* 35. a. 35. b. 36. a. 36. b. 37. a. &c.

(D) Dower *de la plus Beale*.

DOWER *de la plus beale* is, when the husband dies having lands, part in *chivalry* and part in *socage*, his heir within the age of 14 years, by which the lord enters as guardian in *chivalry* into the lands held of him, and the wife into the other land as guardian in *socage*, and afterwards she brings dower against the guardian in *chivalry*; he may plead this matter, and pray, that she may be endowed of the most fair of the lands in *socage*; and judgment shall be accordingly. *Lit. f.* 48, 49.

So, tho' the lands in *socage* be not sufficient for her whole dower, she

she shall have it in them for so much, and the residue only out of the land held in *chivalry*. *Semb. Co. L. 39. a.*

After such judgment to recover *de la plus beale*, &c. the wife may, in the presence of her neighbours, endow herself by metes and bounds of the fairest of the lands in focage. *Lit. f. 49.*

And she shall hold for her life. *Co. L. 39. b.*

But the heir, before entry of the guardian in *chivalry*, cannot pray that the wife shall be endowed *de la plus beale*: for it is a privilege allowed only for saving the estate of the guardian in *chivalry*. *Lit. f. 50. Vide Co. L. 39. b.*

So, such endowment cannot be without the judgment of a court. *Lit. f. 50.*

(E) Jointure.

(E 1.) When it shall be a Bar to Dower.

BY common law, a jointure made to a wife after or before marriage, was not a bar to her dower: for a title to a freehold shall not be barred by a collateral satisfaction. *Co. L. 36. b. R. 4 Co. 1.*

But now, by the *st. 27 H. 8. 10.* where an estate hath been or shall be made in lands, tenements, or hereditaments, to a man and his wife and the heirs of the husband, or to them and the heirs of their two bodies, or of one of them, or to them for their lives, or for the life of the wife, or to others to like uses, for the jointure of the wife; such jointress shall not have dower in any other lands which were her husband's.

So, in every case, where an estate is limited to the wife for her life, or for a greater estate, solely or jointly with her husband, which shall take effect in possession or profit immediately upon the death of the husband, it shall be a good jointure. *Co. L. 36. b.*

Tho' it be limited to the wife solely for her life, or to the husband for life, and afterwards to the wife in remainder (after the death of her husband) for life: for the cases mentioned in the statute are only for example. *R. 4 Co. 2. a. Dy. 228.*

Or, to husband and wife, and the heirs males of their bodies. *4 Co. 2. b. R. Dy. 96.*

Or, to the wife and her heirs in fee-simple. *R. 4 Co. 3. b. R. per three J. two cont. Dy. 248. a.*

So, tho' it be limited to the wife with a condition annexed: for if the condition was unreasonable, it need not be accepted; and if it be accepted, it is the wife's fault if she breaks it. *R. 4 Co. 2. b. Semb. 1 Leo. 311.*

Tho' it be a condition in law; as, if the limitation be *durante viduitate*: for this is an estate for her life, if she pleases. *4 Co. 2. b.*

[A conveyance must be to the wife herself, and not to trustees, in order to make the provision a jointure in point of law. *Hervey v. Hervey, M. 1739, 1 Atkyns, 561.*]

So, tho' the estate be limited to the use of the wife: which is executed by the statute. *Mo. 28.*

Or the husband, or his father, makes a feoffment upon condition to enfeoff the wife. *Mo. 28.*

So, a devise to a wife for life, in tail, &c. if it be expressed for her jointure,

jointure, or in satisfaction of her dower, shall be a bar of dower. *R. 4 Co. 4. a. Co. L. 36. b.*

So, an estate limited to a wife (otherwise than by will) may be averred to be for her jointure, if it has the requisites of a jointure; tho' it be not so expressed. *R. 4 Co. 3. Vide Ow. 33.*

So, a devise, which has words tantamount, though it is not expressed for a jointure, shall be a bar. *Lut. 737.*

So, if a jointure be before marriage, she cannot waive it, and claim dower. *R. 4 Co. 3. a.*

(E 2.) When not.

But by the *st. 27 H. 8. 10.* if a woman shall have a jointure made her after marriage, unless by act of parliament; she may refuse her jointure, and demand her dower at common law.

Tho' before marriage an estate was limited to her in part of her jointure, and after marriage another for her whole jointure. *R. 4 Co. 3. a.*

What shall be a waiver, *vide in Baron and Feme, (S 4, &c.)*

[Jointure is not a bar to dower, when the original agreement is not in writing, or if the husband is an infant. *Bern v. Bern, M. 8 G. 2. B. R. H. 72.*]

By the *st. 27 H. 8. 10.* if any woman be lawfully evicted of her jointure, or any part of it by entry, action, or by discontinuance of her husband without fraud, she shall be endowed of as much of her husband's lands of which she was dowable, as she was evicted of.

So, if evicted for part in the life of the husband, she shall be endowed for so much, tho' she accepts the residue of the jointure. *R. Mo. 717.*

So, if part was entailed, and the issue entred, and was in ward to the king. *R. Mo. 721, 2.*

But she shall be endowed only for life, tho' she be evicted of an estate-tail, or in fee. *4 Co. 3. b.*

Nor, shall she be endowed, if she joins with her husband in a fine of her jointure. *Co. L. 36. b.*

So, it shall not be a jointure to bar dower, if the estate limited to the wife does not take effect to her in possession, or profit, immediately upon the death of the husband: as, if it be limited to the husband for life, afterwards to *B.* for life, afterwards to the wife for life; tho' *B.* dies in the life of the husband. *Co. L. 36. b. R. 4 Co. 2. b.*

Or, to *B.* for life in possession, and afterwards to wife for life. *4 Co. 2. b.*

So, if it be to the wife for the life of another, or for two or three lives, it is not a jointure. *Co. L. 36. b. 4 Co. 3. a.*

Or, for a hundred, or a thousand years. *Co. L. 36. b.*

So, if it be limited to *A.* and his heirs, in trust for the wife for her life; it is not a jointure. *Co. L. 36. b.*

Or, by bargain and sale upon trust to make a jointure. *Mo. 28, 9.*

So, if it be limited in satisfaction of part of her dower, it shall not be a jointure. *Co. L. 36. b. 4 Co. 3. a.*

So, if an estate to husband and wife and their heirs, upon condition, be averred for a jointure; the settlement, without other circumstances, is not a proof of it. *R. 1 Leo. 311.*

So,

So, a devise cannot be averred for a jointure, if the words of the will do not import it. *R. 4 Co. 4. a. R. Lut. 737.*

When an alienation of a jointure shall be a forfeiture, or not, *vide in Forfeiture. Vide Discontinuance, (A 5, 6.)*

[(E 3.) When the Wife shall be put to her Election.]

[When a jointure is made *after* marriage, the wife shall be put to her election, whether to take the jointure or her dower, for she cannot have both. *Vid. supra, (E 2.)*]

[So, if the husband make a devise in favour of the wife, and express it to be in satisfaction of her dower. *Vid. Ambler, 468. 682. 730.*]

[So, if he has disposed of his property in such a manner, that the devise is inconsistent with the dower: as, where he gave her an annuity out of his freehold estates, and subject to that annuity devised all his freehold estates to other persons. *Ambler, 468.*]

[So, where he gave an annuity to his wife, and subject to that annuity gave his lands to trustees upon other trusts. *Id. 682.*]

[So, tho' it appear that the dower is of more value than the annuity. *Id. 730.*]

(F) How a Wife shall lose her Dower.

(F 1.) By Attainder.

BY common law, the wife shall lose her dower, if her husband was attainted of high or petit treason. *Co. L. 37. a. 41. a. Vide ante, (A 2.)*

So, if he was attainted of a felony, above petit larceny. *Co. L. 37. a. 41. a.*

And that, as well dower *ad osium ecclesie, ex assensu patris*, or by custom, as dower at common law. *Co. L. 37. a. 41. a.*

And dower against the feoffee of her husband before the treason or felony committed, as well as against the king, or lord by escheat. *Co. L. 41. a. R. per all the Judges, Dy. 140. b. R. 1 Leo. 3. Sav. 54.*

But a wife shall not be barred of her jointure, if her husband be attainted of treason or felony. *Co. L. 37. a.*

So, by the *st. 1 Ed. 6. 12.* and *5 Ed. 6. 11.* the wife shall have dower, tho' her husband be attainted for murder, or other felony. *Co. L. 37. a. 41. a. Vide ante, (A 2.)*

(F 2.) By Elopement,

By *st. W. 2. 13 Ed. 1. 34.* if a wife willingly leave her husband, and go away and continue with her adulterer, she shall be barred for ever of action to demand her dower, if she be convicted thereupon, except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him. (*Vide Co. L. 32. a. b. 2 Inst. 435. 1 Rol. 680. P.*)

(G) Remedy for Dower,

(G 1.) Right of Dower.

A WRIT of *right of dower* lies, when a wife has dower of part in the same vill: for then she cannot have dower *unde nihil habet* against the same tenant. *Reg. 3. a. F. N. B. 8. C.* But

But it does not lie where a wife loses the land which she holds in dower, by default : for by the *ſt. W. 2. 4.* ſhe ſhall have a *quod ei deſorceat* ; and before, ſhe had no remedy but by a writ of *diſceit*, if ſhe was not ſummoned. *F. N. B. 8. D.*

Or, if ſhe loſes in an aſſiſe, or other action ; for ſhe has no remedy but by attain. *F. N. B. 8. D.*

Nor, in any caſe where ſhe ever had poſſeſſion of her dower by aſſignment, or otherwiſe. *Qu. F. N. B. 8. D. E.*

A writ of right of dower lies of a third part, or of a moiety, according to the uſage. *Reg. 3. b. F. N. B. 8. H.*

And ſhall be directed to the heir, if he has a court, or his guardian. *Reg. 3. a. F. N. B. 7. E. 8. C. K.*

And if by reaſon of his poverty, he has not a court : to the lord of the fee. *Reg. 3. a.*

Since the *ſt. Quia emptores terrarum*, if the huſband aliens the whole in fee, it ſhall be directed to the feoffee. *F. N. B. 7. F.*

If he aliens the whole in tail, or for life, it may be ſued in *C. B.*, ſuggeſting *quod dominus remiſit curiam* : for he in reverſion has but a feigniory in groſs, and cannot hold a court. *F. N. B. 8. A. B.*

And where the lord cannot hold a court, *C. B.* will proceed upon ſuch writ *quia dominus remiſit curiam*, tho' the aſſent of the lord cannot be proved. *F. N. B. 8. B.*

Yet if the lord has a court, and a writ be in *C. B. quia dominus*, &c. a prohibition lies to the juſtices of *C. B.* *Qu. F. N. B. 8. B. Vide Droit, (C 2.)*

And if the huſband has not aliened the whole, the writ ſhall be directed to the heir, or his guardian. *F. N. B. 7. F. 8. A.*

If the heir will not do right, the demandant may remove the plaint out of his court by *tolt* to the county, and out of the county by *pone* to *C. B.* without any cauſe in the writ. *F. N. B. 7. E. Vide Droit, (B 5.)*

So, the tenant, with cauſe, may remove it out of the court of the heir or lord to *C. B.* by *recordari*, or out of the county by *pone*. *F. N. B. 7. E. Vide Droit, (B 6.)*

The proceſs in the court of the heir is a precept in nature of a ſummons, *grand cape*, and *petit cape*. *F. N. B. 8. F.*

After the plea removed into *C. B.* the proceſs ſhall be *grand cape* and *petit cape*. *F. N. B. 8. F.*

(G 2.) Dower unde nihil habet.

Dower *unde nihil habet* is a writ of right in its nature ; and lies in all caſes, where a woman has a right to dower, except where ſhe has part from the ſame tenant in the ſame vill, where ſhe now demands it. *Vide F. N. B. 8. C. 147. E. 148. A, &c.*

Pleading in Dower.

Vide Pleader, (2 Y 1, &c.)

Admeaſurement of Dower.

For admeaſurement of dower, *vide the ſt. W. 2. 7. Co. L. 39. a. 2 Inſt. 367, &c. F. N. B. 148. F. &c.*

Concerning

Concerning dower in equity, *vide Chancery*, (3 E 1, 2.) *Vide also Copyhold*, (K 2.)—*Waste*, (F 2.)

D R A W E R.

Drawer of a Bill of Exchange.

Vide Merchant, (F 4. 12.)

Wine-Drawer.

Vide London, (K 5.)

D R O I T.

(A) Right to Land.

RIGHT is to the possession, or to the property of lands, or to both. *Co. L.* 266. a.

(B) Writ of Right. Right Patent.

(B 1.) When it lies.

A WRIT of right is either properly so called, or such in its nature. *Co. L.* 158. b. *Vide Action*, (D 2.)

A writ of right is the highest of all real actions, and the last remedy for the recovery of lands and tenements. *Co. L.* 158. b. *F. N. B.* 1. A.

A writ of right, properly so called, is either patent, or close.

When it is directed to the lord of whom the lands are holden, it is patent, to do right in his court. *F. N. B.* 1. F.

But it shall be close, 1. When it is for lands *in capite* by *præcipe in capite*. *Vide post.* (C 1.)

2. When brought in *C. B.* for lands holden of another lord, *quia dominus remisit curiam*. *Vide post.* (C 2.)

But when in *London* for lands there, it shall be patent. *F. N. B.* 6. B. *Vide post.* (D).

3. When in *antient demesne* for lands which are *antient demesne*, it shall be close. *Vide Antient Demesne*, (G 1, &c.)

A writ of right patent lies for lands and tenements only by tenant in fee, against him who is tenant of the freehold. *F. N. B.* 1. B. E.

As, if tenant in fee dies seised, and a stranger abates; the heir may have right patent, or *mortd'ancestor*. *F. N. B.* 1. C. D.

Or, if a man seised in fee loses by default in a *præcipe quod reddat*, he may afterwards have right patent. *F. N. B.* 1. D.

So, if he loses by verdict in a *præcipe quod reddat*. *F. N. B.* 5. M.

Or, if the demandant be barred in any other real action, he may afterwards have a writ of right. *F. N. B.* 5. N.

So, if the demandant be barred by the statute of limitations in all inferior actions.

So,

So, if he loses by default in a writ of right before the *mise* joined, he may have a writ of right *de novo*. *F. N. B. 5. N.*

Right patent lies of all lands and tenements; as, of a house, meadow, piscary, rent, &c. *F. N. B. 1. L. 2. C. 6. A.*

Of a passage across a water, and pasture for so many cattle certain. *F. N. B. 1. L.*

And of so many acres *jampnor*. & *bruer*. is well, without saying so many acres of each. *1 Leo. 169.*

(B 2.) When not.

But it does not lie for tenant for life. *F. N. B. 1. B.*

Or, for tenant in tail, or *frank-marriage*. *F. N. B. 1. B.*

Or, by a parson, vicar, prebendary, &c. *F. N. B. 5. C.*

So, it ought not to be brought of an advowson, or common, &c. *F. N. B. 1. B.*

Nor, of an office; for an assise does not lie of it by the common law, but a *quod permittat*. *R. 1 Leo. 169. 2 Leo. 36.*

Nor, *de pomario*: for it is not named in the register, and it is included in the word *gardinum*. *1 Leo. 169.*

So, it does not lie against him who has not a freehold at least: as, against tenant for years. *F. N. B. 1. E.*

Or, against tenant by statute-merchant, staple, or *elegit*. *F. N. B. 1. E.*

So, if the demandant or tenant be barred by judgment after the *mise* joined in a writ of right, it shall be final; and he shall never have another writ of right. *F. N. B. 5. N.*

Tho' the judgment be upon a nonsuit, or default. *F. N. B. 5. N.*

(B 3.) How sued.

(B 3.) *To whom directed.*] A writ of right patent shall be always directed to the lord of the manor of whom the lands are holden, or his bailiff; and shall command him *quod rectum teneat* for such land, &c. *F. N. B. 1. F.*

And it is in the nature of a commission to him, to do right in his court. *F. N. B. 1. F.*

If land be holden of another person than the king, the writ shall be directed to the lord himself if he be in the kingdom; otherwise, to his bailiff. *F. N. B. 1. G. H. Mo. 1.*

If it be holden of the king; as, of an honour, manor, or in burgage; it shall be directed to his bailiff. *F. N. B. 1. I. Mo. 1.*

If it be holden of a bishop, abbot, &c. after election and before consecration, it shall be directed to his bailiff. *F. N. B. 1. F. 2. E.*

So, if land were in the king's hands in the time of the vacation, by reason of ward, &c. or in the hands of the patentee of the ward, &c. it should be directed to the bailiff of the manor. *F. N. B. 2. A. E.*

So, if the lord has no court for the poorness of his manor, it shall be directed to the lord paramount. *F. N. B. 2. A.*

So, if the lord refuses to hold his court, there shall be a writ to him to do it; and upon that an *alias*, *pluries*, and attachment. *F. N. B. 3. E.*

(B 4.) *In what form it shall be.*] A writ of right patent expressed by what services the land is holden. *F. N. B. 1. I.*

So, it ought to mention the several particulars in the order prescribed by the register. *F. N. B. 2. C.*

A writ may be sued against divers persons together, tho' they hold severally. *F. N. B. 2. D.*

The writ shall be brought by the demandant to the steward of the court, who makes an entry, and returns it to him.

And the original writ of right patent remains always with the demandant, and not with the steward of the court, or the sheriff. *F. N. B. 4. D.*

(B 5.) How removed.

(B 5.) *By toll.*] The plaintiff may remove right patent by *toll* into the county-court, if it be delayed in the lord's court. *F. N. B. 3. F.*

So, the plaintiff may remove right patent out of the county-court into *C. B.* by *recordari*, or *pone*. *F. N. B. 4. A. B.* But *semb.* that it shall be by *pone* only. *F. N. B. 4. C.*

And this without cause expressed in the writ. *F. N. B. 4. B.*

But the plaintiff cannot remove right patent out of the lord's court by *recordari*, *per saltum* into *C. B.* without having a *toll* to remove it first into the county-court. *F. N. B. 4. A.*

So, the tenant cannot remove right patent by *toll* into the county-court. *F. N. B. 4. A.*

(B 6.) *By recordari.*] So, the tenant may remove right patent, for cause, directly out of the lord's court into *C. B.* by *recordari*. *F. N. B. 4. A. C.*

As, if the bailiff of the court favours the demandant. *F. N. B. 4. A. B.*

So, if the tenant pleads a foreign plea, or bastardy. *F. N. B. 4. B.*

Or, joins the *mise* upon the grand assize. *F. N. B. 4. B.*

[*Recordari* delivered after interlocutory, and before final judgment, stops proceedings in that court; and the officer must obey the writ, tho' his fees are not paid. *Bevan v. Prothijk*, *P. 1 G. 3. 2 B. M. 1151.*]

And if the lord or sheriff will proceed after such plea, the tenant may have a prohibition; and upon that an *alias*, *pluries*, and attachment. *F. N. B. 4. E.*

So, the tenant may remove right patent out of the county-court, by *pone* for cause. *F. N. B. 4. D.*

(C) Right Close.

(C 1.) *Præcipe in Capite.*

SO, if land be holden of the king *in capite* the writ of right shall be close, and returned into *C. B.* *F. N. B. 5. G.*

And this is of as high a nature, and lies only by tenant in fee, in the same cases as right patent. *F. N. B. 5. G.*

But if a *præcipe in capite* be sued in *C. B.* when the land is not holden of the king, the lord may have a writ out of *Chancery* to surcease the suit, if it appears that the tenure is of another person than the king. *F. N. B. 3. D.*

Or, a writ to the justices of C. B. to surcease. *F. N. B. 5. B.*

Yet the tenant himself cannot plead that the tenure is not of the king; but only shall take it by protestation. *F. N. B. 5. L.*

As to right close in *antient demesne*, vide *Antient Demesne*, (G 1, &c.)

(C 2.) *Quia Dominus remisit Curiam.*

(C 2) *When it lies.*] So, by licence of the lord; a man may sue a writ of right in C. B., and then the writ shall be close; and directed to the sheriff. *F. N. B. 2. F.*

And such licence may be given before, or after the writ purchased. *F. N. B. 2. F.*

And the letter of licence shall be certified into *Chancery*. *F. N. B.*

3. A.

So, a man may sue a writ of right returnable in C. B., with this clause after the *teste*, *quia dominus remisit curiam*, tho' no licence be given: for it is not traversable: and this is the proper original in a writ of right in C. B. *F. N. B. 2. F. 3. B.*

So, if this clause be omitted, when licence is afterwards given, it is sufficient. *F. N. B. 2. F.*

So, if this clause is inserted, it is well, tho' the lord never remitted his court. *F. N. B. 3. B.*

Tho' the land was holden of him in gross, and the lord had not a court: for then there is the more reason that the writ should be sued in C. B. *F. N. B. 3. C.*

But this cannot be where the land lies in *Durham*. *Semb. 1 Bul. 160.*

(C 3.) *How it shall be proceeded upon.*] After the original sued in right *quia dominus remisit curiam*, the tenant ought to be summoned. *Vide Booth of Real Actions, 92.*

If the suit was commenced in the lord's court, it ought to be removed by tolt, &c. *1 Semb. Bul. 159, 160.*

If the tenant be summoned, the sheriff returns his writ.

At the fourth day after the day of the return, the tenant may be essoined. *Vide Booth of Real Actions, 92.*

And thereupon the demandant ought to adjourn the essoin for 15 days; otherwise he shall be nonsuited. *Ibid.*

If the tenant does not appear at the return of the summons, nor be essoined, a *grand cape* issues against him. *Ibid.*

If he does not appear at the return of the *grande cape*, judgment final shall be against him. *Ibid.*

So, if he does not appear at the day given by the essoin, tho' there be no *grand cape*. *Ibid.*

If the tenant appears at the day of the summons, or at the day given by the essoin, he may have a writ of view. *Vide Booth of Real Actions, 92, 3.*

And at the return of the writ of view, he may have another essoin: *Vide Booth of Real Actions, 93.*

And at the day of return of the view, or the day by the essoin, he may imparl. *Ibid.*

(C 4.) *The count, &c.*] If land be holden of the king *in capite*, in a writ of right *quia dominus remisit curiam*, &c: after appearance, the demandant ought to count.

The count may allege *esplees* in the demandant or his ancestor. *F. N. B. 5. M. (Vide F. N. B. 5. D.)*

[And a *seisin* in the ancestor means only a *seisin* in the person from whom there is a *descent*. So, where the demandant claimed as heir to the *devisee* under a will, who had never been *seised* of the *esplees*, it was adjudged that he could not recover. *Dally v. King, Bl. Rep. of Cases in C. B. East. 1788, p. 1. (a).]*

If the writ be upon his own *seisin*, it ought to be within 30 years. *1 Bul. 162.*

If upon the *seisin* of his ancestor, within 60 years is sufficient. *1 Bul. 162.*

After the count, the tenant may demand a view. *Vide Booth of Real Actions, 94.*

And after the view he may imparl. *Ibid.*

(C 5.) *The plea in right* quia dominus remisit curiam *mise* upon the mere right.] If the tenant pleads to the count, he shall plead to be tried by *battel*, by the grand assise, or by a common jury. *Vide Booth of Real Actions, 95.*

If he joins the *mise* upon the mere right, he may defend in *battel*, *per corpus liberi hominis sui. Vide Battel, (A 2.)*

Or, may put himself on the grand assise. *Vide Battel, (A 3.)*

[Every thing may be given in evidence upon this issue but collateral warranty. *Tiffen v. Clarke, C. P. E. 13 Geo. 3. 3 Wils. 419. Brooke, tit. Droit, 48. Booth, 98. 106. 112. 115.]*

If the *mise* be put upon the grand assise, it shall be joined without reply by the demandant. *Vide Booth of Real Actions, 96.*

[The court will not permit the *mise* to be tried by a jury, instead of by the grand assise, tho' both parties desire it. *Galton v. Harvey, C. P. H. 38 Geo. 3. 1 Bos. & Pull. Rep. 192.]*

But the demandant may afterwards imparl before process for the grand assise. *Ibid.*

And if the tenant does not appear at the day given by the imparlance, judgment shall be against him, as upon a departure in despite of the court. *Vide post. (C 6.) Vide Booth of Real Actions, 96.*

After the recognitors sworn, (the manner of which, *vide in Battel (A 3.)*) the tenant shall give his evidence first: for the affirmative is upon him. *3 Leo. 162. [Dyer, 247. pl. 75. Moor, 762. Booth, 98.]*

(C 6.) *Judgment.*] If the demandant after the *mise* joined upon the mere right, makes default, judgment final shall be against him, viz. *quod tenens teneat terram illam sibi & heredibus in pace versus petentem & heredes suos in perpetuum. Co. L. 295. b.*

So, if the demandant confesses the action, or be nonsuited. *Co. L. 295. b.*

So, if the verdict of the grand assise be against him. *Co. L. 295. b.*

Tho' the verdict be given upon a collateral point, and not upon the right. *Co. L. 295. b.*

Judgment in a writ of right was final and peremptory to all strangers (as well as parties and privies) within the realm, and out of prison,

[*(a)* Hence it follows, that if the *devisee* under a will, or his representatives, let the time limited for an ejectment elapse, they can have no remedy]

discover,

discover, and of sound memory, and full age, if they did not enter, or sue an action and make claim within a year and a day. *Pl. Com.* 357. *a. Co. L.* 254. *b.* 262.

And this in all cases where judgment final is given, tho' by default, &c. *Pl. Com.* 357. *b.*

But if a default be after an imparlance to another term, judgment final shall not be given before a *petit cape* awarded. *R. 1 Bul.* 160.

(D) Right Patent in *London*.

SO, a writ of right patent lies in *London* by tenant in fee, of lands or tenements in *London*. *F. N. B.* 6. *b.*

And it shall be directed to the mayor and sheriffs of *London*. *F. N. B.* 6. *C.*

And it lies in the same cases, and the proceedings upon it shall be in the same manner as upon other writs of right patent; without making protestation to sue as in an action at common law, as it shall be upon a writ of right close. *F. N. B.* 6. *B. G.* 7. *a.*

(E) Writ in Nature of a Writ of Right.

(E 1.) The several Species of it.

A Writ in the nature of a writ of right lies by a lord against his tenant or another, for recovery of his services; or by the tenant against his lord, where services are encroached; or by a particular tenant for recovery of his right. *Vide Action*, (D 2.)

If the tenant disclaims the tenure, the lord shall have a writ of right upon the disclaimer for the land. *Vide post*. (F).

If he refuses his rent or services, the lord shall have a writ *de consuetudinibus & servitiis*. *Vide post* (G).

If he ceases for two years, and has not a distress, by *ss. W.* 2. 21. the lord shall have a *cessavit*. *Vide Cessavit*.

If a villein flies out of his manor, he shall have a *nativo habendo*. *Vide Villenage*, (C 1, 2.)

If any, bound by tenure or prescription, refuses to grind at his mill, he shall have a *secta ad molendinum*. *Vide post*. (H).

And if upon the death of his tenant, a stranger seizes the body or land of the heir, the lord shall have a writ of right of ward. *Vide Guardian*, (H 1.)

If his tenant dies without heir, he shall have a writ of escheat. *Vide Escheat*, (B 1, 2.)

If the lord encroaches services, the tenant shall have a *ne injuste vexes*. *Vide post*. (I).

If the lord paramount distrains the tenant *paravail*, he shall have a writ of *mesne*. *Vide post*. (K).

So, if a man claims common in land, the owner who has the fee, shall have a writ of *quo jure*. *Vide Quo Jure*.

So, if he be disturbed in his common, he shall have a *quod permittat*. *Vide Quod Permittat*.—Common (I).

If tenants of lands in several adjoining vills do not know the metes or divisions, one may have against the other a writ *de rationabilibus divisis*. *Vide post*. (L).

If a parson, vicar, &c. be denied the right of his church, he shall have a *juris utrum*. *Vide Quare Impedit* (E).

If a wife be denied her dower, she shall have dower *unde nihil habet*. *Vide Dower*, (G 1, 2.)

If tenant in tail be discontinued, he shall have a *formedon in descender, reverter, or remainder*.

(F) Right upon a Disclaimer.

IF a tenant disclaims upon record to hold land of his lord; the lord thereupon may have a writ of right for recovery of the land. *Vide Abatement*, (F 15.)

As in *replevin*, if the defendant avows for rents and services, and the tenant disclaims the tenure; the lord loses the services, but shall have a writ of right for the land. *Vide Booth of Real Actions*, 133.

And this writ of right shall be patent, and sued in the court of the manor,

Or, may be removed by *tolt* in the county-court, and by *pone* to C. B. *Vide Booth of Real Actions*, 133.

But if the lord accepts his rent from the tenant after the disclaimer, it shall be a bar to a writ of right upon the disclaimer. 3 *Leo*. 271, 2.

But a man seised *in autre droit* cannot disclaim: as, seised in right of his wife, or in right of his church, &c. *Vide Co. L.* 103.

Nor, tenant for life or years, who has not a fee.

Vide Disclaimer.

(G) Writ of Customs and Services.

SO, if a tenant deforces his lord of rent, or services, which he ought to have from him, the lord shall have a writ of customs and services, *F. N. B.* 151. C.

And this writ is a writ of right in its nature, and may be sued before the sheriff by *justicies*, or in C. B. *F. N. B.* 151. B. *Vide County*, (C 5.)

If it be sued returnable in C. B. it is right close, and not patent. *F. N. B.* 151. B.

And it may be brought by tenant in fee, in tail, or for life. *F. N. B.* 151. B.

And against several tenants together. *F. N. B.* 151. F.

If it be by the lord upon his own seisin, it ought to be in the *debet & solet*. *F. N. B.* 151. G. I.

And shall make mention of the services and arrears. *F. N. B.* 151. D.

So, if it be upon the seisin of his ancestor, it shall be in the *debet* only, and omit the word *arreragiis*. *F. N. B.* 151. D. G. 1.

If the lord claims homage, it ought to be expressly mentioned in the writ. *F. N. B.* 151. L.

In this writ the tenant in fee shall join the *mise*, tho' the lord has not a fee, but a tail, or only for life: for the weakness of his estate shall not prejudice the tenant. *F. N. B.* 151. N.

So, if the tenant has only for life, he may pray in aid of him in remainder, who both may join the *mise* with the demandant. *F. N. B.* 151. N. What

What remedy the lord shall have, if the tenant ceases the payment of his services, *vide in Cessavit.*

What remedy for a villein who flies out of his manor, *vide in Villenage, (C 1, 2.)*

(H) Secta ad Molendinum.

SO, if a tenant or other person bound by prescription to grind his corn at the mill of the lord, withdraws his suit, the lord may have *secta ad molendinum.* F. N. B. 122. M.

And it shall be sued by *justices* in the county-court, or in C. B. F. N. B. 123. A. *Vide County, (C 5.)*

And it may be brought by tenant in fee, in tail, or for life. F. N. B. 123. B.

If it be by tenant in fee, it shall be in the mere right. F. N. B. 123.

If by tenant in tail, or for life, it may be in the *debet & solet.* F. N. B. 123. B.

And it lies, when a tenant is bound by tenure to do suit at a mill, tho' the lord may distrain for it. F. N. B. 122. M.

Or, when any person is bound by prescription to do suit in respect of his residence in such a precinct: as, the villeins of a stranger. F. N. B. 122. M.

So, the lord may have *sectum ad furnum, thorale, &c.* F. N. B. 123. B.

The process shall be summons, attachment, and *distringas.* F. N. B. 123. D.

If the defendant appears, he may have a view of the land, or of the mill. F. N. B. 123. C.

If after appearance he makes default, there shall be a *distringas ad judicium audiendum*; and judgment, if he does not save his default. F. N. B. 123. D.

After appearance, the demandant shall count upon tenure or prescription. F. N. B. 123. E.

To the count, the tenant may plead, *nient seisie, &c. nisi ex voluntate.* *Vide Booth of Real Actions, 138.*

But, *hors de son fee*, is not a good plea. *Vide Booth of Real Actions, 139.*

(I) Ne injuste vexes.

THE writ of *ne injuste vexes* shall be patent, and is a writ of right in its nature, founded upon *st. M. Ch. 10. quod nullus distringatur ad faciend. majus servitium quam debetur*: and therefore it lies where the lord has obtained more service than is due, by the payment of the the tenant without coercion: for, if the lord distrains for this surplus of rent or service, the tenant shall not avoid by bay to the avowry, but he ought to have this writ, which commands the lord, *Ne injuste vexes vel vexari permittas B. de libero tenemento suo quod de te tenet, nec inde ab eo exigas, &c. Consuetudines vel servitia que nec debet nec solet, &c.* F. N. B. 10. C.

And it lies only where the tenant and his ancestors held of the lord and his ancestors. F. N. B. 10. G.

The process is a prohibition, attachment, and *disfringas* against the lord. *F. N. B.* 10. *D.*

The writ, which is prohibitory, has a clause *quod nisi feceris, Vic. L. fieri faciat*, &c. *F. N. B.* 10. *D.*

And therefore, if the lord, after a prohibition delivered, distrains, for more rent or service than he ought, there shall be an attachment returnable in *B. R.* or *C. B.*, and the tenant shall count there, and the lord shall make his defence, &c. *F. N. B.* 10. *H.*

But where the encroachment is not of rent, but of other service, as homage, escuage, &c. the tenant may avoid it upon the avowry, by traversing the tenure; or may sue a *ne injuste vexes*. *F. N. B.* 10. *H.*

(K) Writ of Mesne.

A Writ of *mesne* lies, where there are lord, *mesne*, and tenant, and the tenant *paravail* is distrained by the *mesne*, and by the lord *paramount*; he shall have this writ, which is *viscontiel*, against the *mesne*, and shall recover his damages, and compel him to pay his services. *F. N. B.* 136. *Vide County*, (C 5.)

(L) Writ de Rationabilibus Divisis.

THE writ *de rationabilibus divisis* is a writ of right in its nature, which lies by him who has land in a vill or hamlet, against him who has land near him in another, to ascertain the limits of the vills, and by consequence of the lands which were not before known. *F. N. B.* 128. *L. N.*

And it lies by tenant in fee against tenant for life. *F. N. B.* 128. *O.*

So, by tenants in common of one vill jointly against the tenant of the other. *F. N. B.* 129. *A.*

So, against several tenants which have lands in another vill in severalty, or in common. *F. N. B.* 129. *E.*

But it does not lie by tenant in tail, or for life. *F. N. B.* 129. *C.*

Nor, by a parson of a church. *F. N. B.* 129. *C.*

Nor, by one joint-tenant, or parcener, without his companion; for joint-tenancy, &c. is a good plea. *F. N. B.* 129. *D.*

The writ is *viscontiel*, in which the plaintiff shall make a plaint in the nature of a count, before the sheriff, who by precept shall warn the defendant, and then the plaintiff shall count and the defendant shall answer in the county-court; and if he does not deny, the sheriff shall make division by metes and bounds. *F. N. B.* 128. *P.* *Vide County*, (C 5.)

Or, the defendant may remove it for cause. *F. N. B.* 128. *Q.*

So, if the defendant joins the *mise* upon the mere right, and puts himself upon the grand assise, the plaineiff ought to remove it. *F. N. B.* 128. *Q.*

And then the plaintiff shall count in *C. B.* and the defendant may join the *mise* upon the grand assise, or battel. *F. N. B.* 128. *R.*

And summons and severance, and view shall be allowed. *F. N. B.* 129. *C.*

If tenants in common join, they shall make title and allege the *esplees* severally; and the defendant shall make defence against them severally. *F. N. B.* 129. *A. B.*

(M) Curia Claudenda.

(M 1.) When it lies.

THE writ *de curia claudenda* lies by a tenant of a freehold against another tenant of a freehold of land adjoining, who will not inclose his soil against him as he ought. *F. N. B. 127. H.*

And it lies by *justices* in the county-court, or in *C. B. F. N. B. 127. G. H. Vide County, (C 5.)*

Or, it may be removed out of the county-court into *C. B.* by the defendant for cause, or by the plaintiff without cause. *F. N. B. 127. I.*

The process shall be summons, attachment, and *distringas*. *F. N. B. 128. D.*

If the defendant appears, the plaintiff in his count shall shew the certainty of his land, and of the adjoining land of the defendant. *F. N. B. 128. E.*

And ought to allege, that the defendant ought to inclose by prescription, &c. *F. N. B. 128. E.*

If the defendant makes default after appearance, a *distringas* goes instead of a *petit cape*. *F. N. B. 128. D.*

And if he makes default at the return of it, a writ of inquiry goes for damages, and a *distringas* to make the reparation. *F. N. B. 128. D.*

And it lies for not inclosing land in an open field, as well as for not inclosing a curtilage, garden, &c. *R. Mo. 32.*

It lies by the vendee, where the vendor sells two closes adjoining to another not severed, and does not make an inclosure. *Per two J. two cont. Mo. 775.*

But *curia claudenda* does not lie by tenant for years, or any other who has not a freehold. *F. N. B. 128. B. Dy. 38. b.*

Nor, by a commoner. *F. N. B. 128. C.*

Nor, against any, if his land does not adjoin to the plaintiff's land. *F. N. B. 128. B.*

And therefore the defendant to a *curia claudenda* may plead, non-tenure.

Or, may traverse the prescription.

When an action on the case lies for not inclosing, *vide in Action upon the Case for Negligence, (A 3.)*

(M 2.) Who shall be bound to inclose.

A man may be bound by prescription to inclose his land against another.

So, if the owner of 200 acres in a common moor enfeoffs *B.* of 50 acres, *B.* ought to inclose at his peril, to prevent damage by his cattle to the other 150 acres: for if his cattle escape thither, they may be distrained *damage-feasant*. *R. Dy. 372. b.*

So, the owner of the 150 acres ought to prevent his cattle from doing damage to the 50 acres at his peril. *Dy. 372. b.*

D R U N K E N N E S S.

Vide Justices of Peace, (B 28.)

D U E L,

Vide Battel (B).

D U K E.

Vide Dignity, (B 2.)

DUM FUIT, INFRA ÆTATEM.

(A) The Nature of Writs of Entry.

ALL writs of entry into lands or tenements shew by what means the tenant entred, and what cause the demandant has to demand the possession. *Vide Booth of Real Actions, 172. Vide Enfant, (C 4.)*

Writs of entry are founded upon the entry of the tenant after an alienation, disseisin, or intrusion. *Vide Booth of Real Actions, 172, 173, 174.*

A writ of entry lies upon an alienation by a person incapable: as, a *dum fuit infra ætatem*, upon an alienation by an infant. *Vide Enfant, (C 4.)*

Dum non fuit compos mentis, upon an alienation by an idiot, *non compos*, &c. *Vide Idiot, (D 5.) Vide post. (B).*

Or, upon an alienation by a particular tenant: as, after his death there lies a writ of entry *ad communem legem*. *Vide F. N. B. 207. G. Vide post. (C).*

And by the *st. of Glo. 7.* a writ of entry *in casu proviso* lies upon an alienation by tenant in dower, in her lifetime. *Vide F. N. B. 205. M. Vide post. (D).*

And by the *st. W. 2. 24.* a writ of entry *in consimili casu*, upon an alienation by any other particular tenant. *Vide F. N. B. 207. D. Vide post. (E).*

Or, upon an alienation by a husband seized in right of his wife: as, a *cui in vitâ* by the wife herself. *Vide Baron and Femé, (I 3.)*

Sur cui in vitâ by the heir of the wife. *Vide F. N. B. 193. A.*

Cui ante divortium, and *sur cui anti divortium*, if husband and wife are divorced. *Vide F. N. B. 204. F. Vide post. (G).*

A writ of entry lies in the nature of an assise, or in the *quibus*, upon a disseisin to the demandant himself. *Vide F. N. B. 191. C. Vide post. (H).*

If the disseisin was to his ancestor, or the tenant claims by the disseisor, it shall be a writ of entry in the *per*. *Vide F. N. B. 191. D.*

In the *per* and *cui*, if the tenant claims by the disseisor in the second degree. *Vide F. N. B. 191. D.*

And if he claims after all the degrees, it shall be a writ of entry in the *post*. *Vide Booth of Real Actions, 173. F. N. B. 191. C.*

So, a writ of entry lies upon an intrusion after the death of a particular tenant. *Vide Booth of Real Actions, 173. F. N. B. 203. E.*

Ad terminum qui preterit, if the particular tenant detains the land after his term ended. *Vide F. N. B. 201. D.*

And *causa matrimonii prælocuti*, where a man detains lands given to him by a woman, upon prospect of marriage, which afterwards does not take effect. *Vide F. N. B. 205. A.*

(B) Dum non fuit Compos Mentis.

THE writ *dum non fuit compos mentis* lies by the heir of him who, not being of sound memory, aliens in fee, in tail, for life, or for years. *F. N. B. 202. C. F.*

The process shall be summons, *grand cape*, and *petit cape*. *F. N. B. 203. D.*

But it does not lie by the issue in tail; for he shall have a *formedon*.

(C) Writ of Entry ad Communem Legem.

A writ of entry *ad communem legem*, lies by the heir, or him in reversion seised in fee, if tenant by the curtesy, in dower, or for life, aliens in fee, in tail, or for life. *F. N. B. 207. G.*

(D) Writ of Entry in Casu Proviso.

SO, by the *st. of Glo. 7.* the heir, or he in reversion, shall have a writ of entry immediately, if tenant in dower, or for life, aliens in fee, or for life; for tho' upon such alienation in fee the heir, or he in remainder, might enter by the common law, yet if the entry was tolled by the death of the alienee and a discent, he had not a writ of entry *ad communem legem* till the death of the alienor, and then the heir frequently was barred by the warranty of his ancestor; wherefore this writ was provided, called a writ of entry *in casu proviso*. *2 Inst. 309. F. N. B. 205. M.*

(E) Writ of Entry in Consimili Casu.

SO, by the *st. W. 2. 24. De catero, cum in uno casu conceditur breve, in consimili casu, simili remedio indigente, sicut prius fiat breve.*

And upon this statute, if tenant by curtesy aliens in fee, in tail, or for life, or tenant for life, or *pur autre vie*, aliens, &c. he who has the estate in reversion, in fee, in tail, or for life, shall have a writ of entry *in consimili casu*; tho' he had no remedy by the *st. of Glo. 7.* *F. N. B. 206. F. 2 Inst. 405.*

(F) Cui in Vitâ.

For *cui in vitâ*, vide *Baron and Feme*, (I 3.)

(G) Cui ante Divortium.

SO, if the husband aliens the land of his wife, and afterwards they are divorced, she shall have a *cui ante divortium* against the alienee. *Vide F. N. B. 204. F.*

So, since the *st. 32 H. 8. 28.* which makes the alienation by the husband void; for the entry of the wife is preserved only after the death of the husband. *Per Dy. Mo. 58.*

(H) Writ of Entry in the Quibus, or in Nature of an Affise.

A Writ of *quibus* lies, instead of an affise, by tenant in fee, or his heir, if he or his ancestor be disseised of lands, or tenements, rent, or office, &c. F. N. B. 191. C. *Vide Affise.*

DUM NON FUIT COMPOS MENTIS.

Vide Dum fuit infra Ætatem (B).

D U R E S S.

Vide Juslices, (S 1.)—*Pleader*, (2 W 19.)

D U C H Y.

Vide Franchises, (D 3.)—*Patent*, (C 4.)

E A R L.

Vide Dignity, (B 4.)

ECCLESIASTICAL PERSONS.

(A) The King.

THE king is *persona sacra*; and therefore he may constitute and restrain ecclesiastical jurisdiction. *Vide Prærogative*, (D 9.)—*Prohibition*.

May dispense with the ecclesiastical laws. *Vide Prærogative*, (D 11. 17, &c.)

May inflict ecclesiastical censures. *Vide Prærogative*, (D 12. 21, 22.)

May make an appropriation without the bishop, where he himself is patron; and with the consent of the patron only, where a subject is patron.

May take a resignation from a dean of his deanry, as well as the bishop; for he is supreme ordinary.

(B) Persons Regular.

(B 1.) The Pope.

(B 1.) *What authority was* ALL ecclesiastical persons are regular, *allowed to the pope.*] or secular. Co. L. 93. b.

Regulars are those who have vowed obedience, chastity, and poverty. Co. L. 93. b.

The head of these orders was the pope.

By the ignorance and sufferance of superstitious times, the pope antiently had the reputation of supreme head of the *English* church. *Hob.* 146, 7.

From

From him all the power of ecclesiastical persons was esteemed to be derived. *Hob. 147.*

He created and consecrated bishops.

And such creation by the pope made one a bishop *de facto*, and capable to take the king's confirmation. *Pal. 346.*

But in truth all the authority of the pope was by usurpation, and void. *Hob. 146. Vide Popery.*

And therefore, where the pope by his authority made a provision for benefices, it was alwas disallowed. *Vide Provisor.*

So, the pope could never make a corporation. *Jon. 184.*

Nor, had jurisdiction within the realm. *4 Inst. 321.*

Yet some acts of the pope had the semblance and allowance of right, and such authority was given to the archbishop by the *st. 25 H. 8. 21. Vide Prærogative, (D 20.)*

(B 2.) An Abbot, Prior, Monk, &c.

(B 2.) *How professed.*] All regulars were entred in some house of religion, as an abbey, priory, monastery, &c. and there professed.

A man was entred into religion, by his admittance into a house of religion. *Co. L. 132. a.*

But he was not professed till the year of probation expired, when he had taken the habit of his order, and vowed perpetual obedience, chastity, and poverty. *Co. L. 132. a.*

(B 3.) *The diversity of the orders.*] There are several orders of houses of religion.

There were four orders of friars; as, *Friars, Minors, Carmelites, Augustines*, and *Friars Preachers*. *Co. L. 152. a.*

And the *Friars Minors* comprehend the *Franciscans, Capuchins*, and *Observants*. *Co. L. 132. a. 136. a.*

Vide Monastery.

(B 4.) *The head of a convent.*] The head of the convent was the abbot, or prior.

Who ought to be chosen by the convent. *2 Rol. 102.*

(B 5.) *The convent.*] The body of the convent consisted of monks, canons, friars, or nuns. *Co. L. 136. a.*

(C) Persons Secular.

(C 1.) Archbishop.

THERE are within the kingdom only the two archbishops, of the provinces of *Canterbury* and *York*. *Co. L. 94. a.*

How elected, *vide post. (C 2.)*

The archbishop of *Canterbury* has the style of *Metropolitan*; and *Primate of all England*. *Co. L. 94. a.*

The archbishop of *York*, *Metropolitan*, and *Primate of England*.

York has within his province, *Durham, Carlisle, Chester*, and *Man*: *Canterbury* has all the others. *4 Inst. 322.*

By the *st. 25 H. 8. 20.* the archbishops upon a *congrè d'eslire* are elected, and afterwards confirmed, and consecrated. *Vide post. (C 2.)*

Every

Every bishop and archbishop *tenet per baroniam* of the king's foundation; and therefore is a peer in parliament. 4 *Inst.* 45. 362.

The jurisdiction of the archbishop is *ordinary*, as every other bishop's within his diocese. 3 *Lev.* 212. *Vide post.* (C 2.)

Or, *superintendent* over all ecclesiastical persons within his province. 3 *Lev.* 212.

And therefore, all ecclesiastical acts within his province are only voidable, and not void, tho' done when the jurisdiction belonged to a bishop, or other ecclesiastical person within his province; as, if he grants administration when there are not *bona nabilia*. *Vide Administrator*, (B 5.)

Or, if he institutes to an advowson within a peculiar in his province. R. 3 *Lev.* 212.

So, an archbishop has a provincial power over all bishops within his province; and may hold a court where he pleases within his province; and in person officiate as judge. R. 1 *Sal.* 134.

And may deprive. R. 1 *Sal.* 135. *Carth.* 485.

Or, convene them before him for dismeaneor in their function. R. *Carth.* 485.

(C 2.) Bishop.

(C 2.) *How chosen.*] All the bishoprics in *England* are of the king's foundation, and he is their patron. Co. L. 134. a. 1 *Rel.* 880.

And they were originally donative by the delivery of the ring and crozier. Co. L. 134. a. 1 *Rel.* 882. l. 25—50. *Dav.* 90. 2 *Rel.* 102. 130. *Vide Donative.*

But king *John* granted them to be elective. Co. L. 134. a. 1 *Rel.* 880. l. 25—50. *Dav.* 93. 2 *Rel.* 102, 3. *Cod. Ju. Eccl.* 121.

And now, by the *st.* 25 *H.* 8. 20. on avoidance of an archbishopric, or bishopric within any of the king's dominions, the king shall grant a *congè d'eslire*, containing the name of the person to be chosen, and the dean and chapter, &c. shall elect the person so named, and no other. And if they delay election above twelve days after letters missive delivered, the king may by letters patent nominate whom he shall think fit to such dignity. *Vide* 1 *Sal.* 136. 2 *Rel.* 101.

And after such election certified under their common seal, and oath and fealty to the king, his majesty shall by letters patent signify such election, if of an archbishop, to some other metropolitan in his dominions and two bishops, or to four bishops; if of a bishop, to the archbishop of the province, or, if vacant, to some other metropolitan, who shall confirm the election, and invest and consecrate the person elected.

By the *st.* 1 *E.* 6. 2. archbishoprics and bishoprics were made donative: but that statute is now repealed by the *st.* 1 *M.* *ff.* 2. c. 2. and 1 *El.* 1. and the *st.* 25 *H.* 8. 20. revived. Co. L. 134. a. R. 12 Co. 7.

And therefore, upon the death of a bishop, the dean and chapter certified the king of it in *Chancery*, and prayed the king's licence to elect; upon which a *congè d'eslire* goes, and they make the election, and certify it to the person elected himself, and have his consent, then to the king in *Chancery*, and to the archbishop; and the king by his letters patent assents, and commands the archbishop to confirm and

and consecrate; who examines the election, and the ability of the person, and afterwards confirms and consecrates him. *Jon.* 160.

And there is the same proceeding when a bishop is translated, except the consecration, as when he is newly elected. *R. Jon.* 160. *1 Sal.* 136, 7. *2 Rol.* 452.

And by the *st.* 8 *El.* 1. and 39 *El.* 8. all archbishops and bishops of the realm are declared lawfully such. *4 Inst.* 321, 2.

A bishop, tho' chosen, and tho' he has the temporalities delivered to him, is not a complete bishop (unless it be upon a translation) till his consecration. *1 Rol.* 888. *l.* 10. *2 Rol.* 451.

Nor, can he do a judicial act; as, institution to a church, &c. *2 Rol.* 451.

Yet he may do ministerial acts; as, a certificate of bastardy, excommunication, &c. *2 Rol.* 451.

But a bishopric in *Ireland* is now donative. *1 Sal.* 136. *Pal.* 27. *Vide Ireland* (E).

And the bishop shall be created by patent only. *R.* 2 *Cro.* 553. *2 Rol.* 101. 130.

The jurisdiction of a bishop and archbishop, as to the punishment of offences, and the hearing and determining of causes, is derived out of the crown. *Vide Prærogative*, (D 9.)

And therefore, a bishop may make a layman his commissary, chancellor, or official. *R. Jon.* 264. *Cro. Car.* 258.

Or, may officiate as judge in person. *1 Sal.* 134.

So, tho' the *st.* 37 *H.* 8. 17. says, any layman married or unmarried may, being a doctor of the civil law, be a commissary, official, register, &c.; yet if he be not a doctor of the civil law, he may be a commissary, &c. for the statute speaks in the affirmative only. *R. Cro. Car.* 258. *R. Cro. El.* 314.

A bishop is a bishop of the universal church. *Vide Pal.* 345.

And therefore, a bishop of *Ireland*, or *Man*, has the title of bishop here. *Pal.* 345.

As to grant and seizure of temporalities, *vide Prærogative*, (D 23, 24, 25.)

(C 3.) Dean and Chapter.

Every archbishop, and bishop, has a dean and chapter. *3 Co.* 75. a. or a chapter without a dean. *2 Rol.* 453.

All deans and chapters are either antient or new. *Co. L.* 95. a.

In the antient, the dean was chosen by the chapter upon a *congratulation*; and the king having assented, he was confirmed by the bishop. *Co. L.* 95. a.

The archbishops of *Canterbury* and *York*, and the bishops of have antient chapters.

The new chapters are, where the king has translated a prior, and convent, &c. into a dean and chapter to a bishop; as, to the bishop of *Norwich*, &c. *Co. L.* 95. a. *3 Co.* 73, 4.

Or, when the king, upon the erection of a new bishopric, erects a new dean and chapter. *Co. L.* 95. a.

By the *st.* 35 *El.* 3. letters patent for erection, &c. of a dean and chapter are good.

And the dean in the new translations and erections is donative, and by the king's letters patent is installed. *Co. L.* 95. a. [See

[See a very elaborate investigation on the subject of the different kinds of deans, &c. in the notes to Co. Lit. by Mr. Hargrave, fo. 95, et seq.]

The dean is so called, because he has ten prebends or canons at least, of which the chapter consists. *Ibid.*

And he is the head of the chapter. *Ibid.*

And tho' the dean and chapter make a corporation, yet the dean, and every prebendary of the chapter, may be a corporation by himself. 10 Co. 31. b.

So, the dean may have belonging to his deanery, a church, prebend, or other possessions. *Dy.* 273. a.

If a deanery be donative, and the king by letters patent grants the deanery, without limiting any estate; yet he has all the estate in him, viz. to the dean and his successors. *R. Dav.* 46. a.

So, if the king limits the grant to him for life, or at will; yet he shall have the fee. *Dav.* 46. a.

The dean of a cathedral or collegiate church is perpetual, viz. for his life.

And he may be a lay as well as a spiritual man. *Dy.* 273. a. in marg. *Semb. cont.* 2 *Rol.* 341. l. 10.

And his dignity is not an ecclesiastical benefice: for he has not institution, except where it is presentative. *Lind.* 125.

Yet it is a spiritual promotion. 2 *Rol.* 341. l. 10.

A sub-dean is, either *pro hac vice*, substituted by the dean; or perpetual, chosen by the dean and chapter. *Lind.* 327.

But a rural dean is employed by the bishop and archdeacon, and is temporary. *Lind.* 14. 79. 327.

The office of the dean and chapter is, to advise and assist the bishop in matters of religion, to consent to his grants, leases, &c. and to elect the bishop upon a vacancy. 3 Co. 75.

The dean and chapter are a corporation.

And have capacity to take and alien, &c. as another corporation.

So, they may subsist, without any lands or possessions. 3 Co. 75. b. 2 *And.* 167.

A dean has not a freehold till his instalment. 2 *Rol.* 451.

A dean may surrender his deanery to the king, by which it shall be dissolved. *Dy.* 273. (*Vide* 3 Co. 75. b.)

[A dean and chapter is a spiritual, and not a lay body. *Lessee of Dean and Chapter of Christ-Church, Oxon's Case, H. 1725, Bunb.* 209.]

Vide Chancery (3 C).

(C 4.) Prebendary.

A prebend is *jus spirituale percipiendi proventus in ecclesiâ, competentes percipienti ex divino officio cui insitit.* *Lind.* 144. verb. *Prebendat.*

A canon is he, *qui est electus in fratrem*, and has a stall in choir, & locum in capitulo. *Lind.* 144. *Dy.* 294. b.

A prebend is derived out of a canonry, *ut filia ex matre; sed sine redditu non potest constitui.* *Lind.* 144.

But if a prebendary aliens his whole possession, he continues prebendary; for he has his stall in the choir, and his voice in the chapter. 3 Co. 75. b.

If he demises his prebend, the prebendary shall do the things proper to his function, and not the lessee.

He

He shall make a commissary, which belongs to him by prescription, and the lessee cannot make one. *Ray.* 88.

(C 5.) Archdeacon.

An archdeacon derives his authority from the bishop, and ought to visit as subordinate to him. *Hob.* 16. *Cod. Ju. Eccl.* 1009. 2 *Rol.* 448.

By the canon 4^{to}. *conc. Toledo.* 35 anno 630. temp. Honor. 1. it was first allowed, that a bishop *languore aut occupationibus implicatus presbiteros vel diaconos mittat, qui reddit. basilicar. reparation. & ministrantium vitam inquirant*; upon which the bishop divided the diocese into archdeaconries, and gave them commission to visit. *Deg*, part 2. c. 15. *Cod. Ju. Eccl.* 1006.

In the time of the Saxons, they had jurisdiction allowed in England. *Rights of Convocation*, 292.

In the time of *William the Conqueror* it was ordained, *quod episcopus vel archidiaconus*, (who before sat with the sheriff,) *placita in hundredo amplius non teneat*, but right shall be done by himself according to the canons, &c. 2 *Rol.* 216. l. 15. *Jan. Angl.* 66.

And therefore, he is now as *oculus episcopi*. 4 *Inst.* 339.

And may hold a court within his archdeaconry, where, by prescription, or composition, he has jurisdiction in ecclesiastical causes. 4 *Inst.* 339. *Vide Courts*, (N 9.)

By the *st.* 24 *H.* 8. 12. an appeal lies from him to the bishop; or, if he be the archdeacon of an archbishop, to the arches. *Vide Prærogative*, (D 13.)

(C 6.) Parson.

(C 6.) *Of what a parsonage consists.*] A parson is he *qui personam gerit*; viz. the rector of a parochial church. *Co. L.* 300. a. *Vide Parson*.

A rectory or parsonage consists of glebe, tithes, and oblations, established for the maintenance of a parson, or a rector to have cure of souls within the same parish.

And there need not be more glebe than the soil of the church, or church-yard.

But there ought to be some land; for if tithes only be proved, it is not a rectory. 1 *Sid.* 91. 3 *Sal.* 377.

(C 7.) *Who may be a parson.*] Every man, presented, instituted, and inducted, shall be parson to a church; tho' he be an alien: for he may take a spiritual possession, not a temporal one. 2 *Rol.* 348. l. 20. *Vide Esglise* (M).

So, an abbot, &c. tho' dead in law. 2 *Rol.* 348. l. 10.

So, one *mere laicus*; for he is parson till deprivation. 2 *Rol.* 348.

l. 30. *Vide Esglise* (M).

Or, wholly illiterate. 2 *Rol.* 348. l. 32.

(C 8.) *Who not.*] By the *st.* 13 *El.* 12. none shall be admitted to any benefice with cure, unless he be of the age of 23 years at least, and a deacon.

And none shall be a minister, or admitted to preach and administer the sacraments under the age of 24 years.

So, by the same statute, none shall be admitted to preach or administer the sacraments, unless he bring to the bishop a testimonial of his honest life and professing the doctrine of the 39 articles; and be able to give an account of his faith in *Latin* according to the said articles, or have a special gift to be a preacher.

Nor, shall be admitted to the order of deacon, unless he first subscribe the said articles.

Nor, to a benefice with cure, unless he shall first have subscribed the said articles in presence of the ordinary, and publicly read the same in the church of that benefice, with declaration of his unfeigned assent to the same.

So, by the *st.* 13 & 14 *Car.* 2. 4. none shall be admitted to a parsonage, vicarage, benefice, &c. before he be ordained priest, according to the form thereby established, unless he was before in episcopal orders.

So, by the same statute, he ought to declare his unfeigned assent and consent to all things contained in the book of common prayer in two months after actual possession, or else shall be *ipso facto* deprived; and the patron may present, &c. as if dead. *Vide Parson* (C).

So, a woman cannot be a parson; for the presentation, institution, and induction of her is null and void. 2 *Rel.* 348. *l.* 33. *Hob.* 149.

(C 9.) *The interest of the parson.*] The parson is seised in right of his church, and the freehold of the church, church-yard, and glebe belong to him. *Co. L.* 300. *b.* *Vide post.* (C 14.)—*Esgliffe*, (G 1.)

And therefore, he may sue and be sued for the right of his church. *Co. L.* 300. *b.*

So, for the benefit of his church or successor, he shall be reputed to have the inheritance *quodam modo*; and therefore, he may have waste, and declare *ad exhereditationem ecclesie*. *Co. L.* 341. *a.*

If his lessee aliens, &c. he may have a writ of entry *ad communem legem* after his death, or in *consimili casu* during the life of the lessee; which writs lie only for him, who has an inheritance, or reversion for life. *Co. L.* 341. *b.* *F. N. B.* 206. *F.* 207. *G.* 49. *D.*

So, he shall have an *ad terminum qui præterit*, and a *quod permittat in the debet*. *Co. L.* 341. *b.*

A writ of *mesne*, or a *contra formam feoffamenti*. *Co. L.* 341. *b.*

So, he shall have a *cessavit*. *F. N. B.* 49. *C.*

And, upon a grant to him and his successors, he shall have a *quid juris clamat*, a *per qua servitia*, or a *quem redditum reddit*. *F. N. B.* 49. *H.*

So, if he be disseised, or aliens in fee, &c. his successor may have a *juris utrum*. *F. N. B.* 48. *R.*

Or, if another recovers against him by default, or by verdict, when he did not pray in aid of the patron and ordinary. *F. N. B.* 48. *R.*

Or, intrudes into the rectory after the death of his predecessor. *F. N. B.* 49. *A.*

So, a parson may receive homage. *Co. L.* 341. *b.*

If a parson be disseised, he himself shall have an assise, or a writ of entry in the *per*, *cui*, or *post*, or in the *quibus*. *F. N. B.* 49. *B.*

But, properly, the fee-simple is not in the parson; but in abeyance. *Lit. f.* 646.

And therefore he cannot have a writ of *right*. *Lit. f.* 645.

Nor,

Nor, a writ in the nature of a writ of right, as a writ of right upon a disclaimer, of customs and services, *ne injuste vexes, rationabilibus divisis, quo jure, &c.* Co. L. 341. b.

(C 10.) Vicar:

(C 10.) *The original of vicarages.*] When a church was appropriated, it was usual to endow a perpetual vicar with parcel of the rectory, to have the cure of souls.

And by the *st.* 15 R. 2. 6. and 4 H. 4. 12. the appropriation shall be void, if a perpetual vicar be not instituted and inducted into the same church and conveniently endowed.

Before those statutes, the endowment of a vicarage upon an appropriation was not necessary. 2 Rol. 99.

And those statutes extend only to future time. 2 Rol. 99. 127. R. Pal. 222.

(C 11.) *How created.*] The parson, patron, and ordinary may create a vicarage without the king's assent. 2 Rol. 334. l. 17.

So, in time of avoidance, the patron, and ordinary. 2 Rol. 334. l. 27.

So, the parson appropriate, and the ordinary. 2 Rol. 334. l. 20. 35.

Tho' the appropriation be to those who have not *curam animarum*; as, to a dean and chapter, nunnery. *Pl. Com.* 497. 2 Rol. 334. l. 25.

But the ordinary without the patron cannot create a vicarage. 2 Rol. 334. l. 15.

(C 11.) *Or reunited.*] So, the vicarage may be reunited to the parsonage; if it be impoverished. 2 Rol. 337. l. 50.

Or, if the parsonage be impoverished. 2 Rol. 338. l. 10.

And may be reunited by the parson appropriate, and ordinary, in time of vacation of the vicarage. 2 Rol. 337. l. 25. Pal. 222.

By parson, ordinary, and vicar, when the vicarage is full. *Ley.* 14.

So, by the pope as supreme ordinary; the parson and vicar, where, by subsequent usage, the intent appears. R. 2 Rol. 99. 127.

If the parson appropriate presents the vicar to the parsonage, with the consent of the ordinary, this reunites them. 2 Rol. 338. l. 5.

Or, presents to the vicarage by the name of *parsonage*. 2 Rol. 338. l. 17.

So, if the parsonage be recovered by a title *paramount* the endowment of the vicarage, they are reunited. 2 Rol. 338. l. 30.

And by union, the endowment of the vicarage returns to the parsonage. 2 Rol. 338. l. 8.

But a vicarage shall not be reunited by the ordinary, except for impoverishment. 2 Rol. 338. l. 12.

And, a presentation of the vicar to the parsonage, by the lessee of the parson, does not bind his lessor. 2 Rol. 331. l. 6.

Or, a presentation by any other than the parson. 2 Rol. 338. l. 22.

Or, by the king. *Dub.* 2 Rol. 338. l. 25.

So, after the *st.* 4 H. 4. 12. a vicarage shall not be dissolved. 2 Cro. 517.

Nor, after the *st.* 31 H. 8. 13. when the parsonage is come to a temporal hand. 2 Cro. 518.

(C 13.) *Endowment.*] By the *ſt.* 15 *R.* 2. 6. and 4 *H.* 4. 12. the ordinary ſhall endow the vicarage according to the value of the church. *Vide ante*, (C 10, &c.)

So, if the vicarage be impoveriſhed, the ordinary may enlarge the maintenance. 2 *Rol.* 337. *l.* 30. 338. *l.* 1.

And there ſhall be a ſuit for it in the eccleſiaſtical court. 2 *Rol.* 337. *l.* 35.

And the vicar may libel there for increaſe of maintenance againſt the parſon impropriate and his leſſee, by the *ſt.* 32 *H.* 8. *R.* 2 *Rol.* 337. *l.* 30.

So, an endowment may be enlarged by the biſhop, upon notice to all, who are intereſted, tho' a power to enlarge be not referred upon the original endowment. *Hard.* 329.

So, if there be no endowment of a vicarage, equity upon an information by the attorney-general, will compel the impropiator of the ſmall tithes to make an allowance. *R.* 1 *Ver.* 247.

Otherwiſe, if there be an endowment, tho' ſmall. 1 *Ver.* 247.

The endowment ſhall be conſtrued by uſage; and therefore, if a vicar be endowed *de minutis decimis*, and he has uſed to have tithes of wood of the yearly value of 6*s.* 8*d.*; tho' wood in its nature is a great tithe, yet in reſpect of the ſmall value and the uſage, the vicar ſhall have the tithes of the wood. *R.* 2 *Rol.* 335. *l.* 45.

So, if he be endowed *de decimis garbarum*, and by uſage he has always had the tithe of hay, as well as of corn. *R.* 2 *Rol.* 335. *l.* 30.; for an augmentation of the endowment ſhall be intended. *Hard.* 328. *Pal.* 222. 2 *Rol.* 161.

So, it ſhall be conſtrued liberally: as, if a vicar be endowed of all tithes, except corn; he ſhall have hops, rape-feed, &c. tho' they be things newly ſown in *England*. *R.* 2 *Rol.* 334. *l.* 40.

If he be endowed of ſmall tithes, and arable land is afterwards converted into paſture, he ſhall have the ſmall tithes of it. 2 *Rol.* 335. *l.* 23.

If endowed of all the tithes of a manor, he ſhall have the tithes of the freeholds, as well as of the copyholds; for they all make the manor. *R.* 2 *Rol.* 335. *l.* 27. *Cro. El.* 463. *Ow.* 58.

Yet a vicar ſhall not have tithes of the glebe, tho' ſevered after the endowment. *R.* 2 *Rol.* 335. *l.* 10.

So, if there be no endowment, the vicar cannot claim any thing. *R.* *Pal.* 426. *Vide ſupra*.

(C 14.) *The intereſt of the vicar.*] By the common law the vicar had not the freehold of the church or church-yard, nor could have a *juris utrum* for his glebe, nor be named tenant to the *præcipe* for his glebe, without his parſon. 2 *Rol.* 336. *F.* *Vide Eſgliſe*, (G 1.)

But now, by the *ſt.* 14 *Ed.* 3. 17. a vicar, &c. ſhall have a *juris utrum* for lands, &c. of the vicarage, and recover in other writs, as a parſon may.

And therefore, he ſhall have an aſſiſe. 3 *Sal.* 377.

So, a vicar ſhall have aid of the parſon, patron, and ordinary. 2 *Rol.* 336. *l.* 48.

So, a vicar ſhall have the trees in the church-yard; for he ſtands liable to the repairs of the church. *Semb.* 2 *Rol.* 337. *l.* 15.

(C 15.) What Persons have Cure of Souls.

The parson of a parish-church has *curam animarum*.

And the perpetual vicar, who is presentative. 2 Cro. 517.

So, a parson appropriate, till a vicar be established. 2 Rol. 341.

l. 50.

So, the parson, where the vicar is instituted only in aid of the parson.

So, a donative of the king may have the cure. 2 Rol. 341. l. ult.

Vide Donative.

So, the parson and vicar may both have the cure; the parson *habitualiter*, the vicar *actualiter*. 2 Cro. 518.

But if a perpetual vicar be presented, the parson ceases to have the cure. 2 Rol. 341. l. 47.

So, a dean, or archdeacon has not the cure.

So, a prebendary has not the cure. 2 Rol. 341. l. 45. Cro. El. 79.

(C 16.) Who are Dignitaries.

Every promotion in the church, having jurisdiction annexed, is a dignity: as, a deanry. Cro. El. 663.

An archdeaconry. *Semb. cont.* Cro. El. 663.

But a parson is not a dignitary. Cro. El. 663.

Nor, a provost. Cro. El. 663.

Nor, a chaplain, or prebendary. Cro. El. 663.

(D) What Privileges belong to Ecclesiastical Persons.

BY the *st. M. Ch. 9 H. 3. 1. Ecclesia sit libera, & habeat omnia jura sua & libertatis illasus.*

So, by the *st. 50 Ed. 3. 1.*

And this extends to all ecclesiastical persons. 2 Inst. 3.

And therefore, no ecclesiastical person shall be chosen to a temporal office: as, sheriff. *Vide infra.*

Nor, shall be expeditor for lands, which he has within a level, for sewers. *Per two J. 1 Mod. 282. 1 Lev. 303.*

Nor, shall be constable, reeve, beadle, &c.

Nor, shall be bound to serve in war in person; for *militans Deo ne implicit se negotiis secularibus.* 2 Inst. 4.

And therefore, if he holds lands by *chivalry*, &c. he ought to find a sufficient deputy, or pay escuage; and need not serve in person. Co. L. 99. a.

So, if he has lands, by reason of which he ought to be a reeve, beadle, &c. when chosen, if he was a layman; he shall not be chosen, being *infra sacros ordines*: or, if he be, he shall have a writ for his discharge, and upon that an *alias*, *pluries*, and attachment. F. N. B. 175. B. Reg. 187. b. 2 Inst. 3.

So, by the *st. Marl. 52 H. 3. 10.* all ecclesiastical persons are discharged of suit at the leet, or torn. 2 Inst. 4. 121.

So, by the common law, *eundo, morando, aut redeundo* from divine service, a priest cannot be arrested. 12 Co. 100. 2 Bul. 72.

And by the *st. 50 Ed. 3. 5.* and 1 R. 2. 15. he that so arrests shall suffer imprisonment, ransom, and make gree to the party: provided he do not hold himself there by collusion.

So, an action lies upon these statutes, if a clerk be arrested, when attending upon divine service. *Vide 12 Co. 100.*

Tho' it be thro' ignorance, and he is afterwards discharged.

So, one may be sued for it in the ecclesiastical court, and shall pay costs. *Vide 2 Bul. 72.*

But the arrest is good; and a rescuer is not excused.

So, he may be arrested at the suit of the king; as, upon a warrant of a justice of peace.

Or, if he absconds, and cannot otherwise be taken.

So, a *capias* does not lie against an ecclesiastical person, who has a benefice: and for his security, upon a statute staple, merchant, or recognizance, there shall be awarded a *capias si laicus*. *2 Inst. 4.*

So, in any other action where a *capias* lies, if the sheriff returns, *clericus beneficiatus, nullum habens laicum feodum*, there shall be a writ to the bishop, commanding, that he compel him to appear. *2 Inst. 4. 2 Rol. 220. l. 45.*

And if the bishop does not cause him to appear, a *distringas* goes against the bishop. *Reg. 26. b.*

So, if upon a *feri facias* the sheriff returns *clericus beneficiatus*, &c. there shall be a *feri facias* to the bishop to levy *de bonis ecclesiasticis*. *Reg. 22. 26. b.*

And upon such a writ to the bishop, he by his mandate shall sequester his benefice till he appears, or the money be levied. *1 Sal. 320.*

[On sheriff's return, that defendant is *clericus beneficiatus nullum habens laicum feodum, fieri facias de bonis ecclesiasticis* issued to the bishop; on affidavit of the debt's being levied, rule to the bishop to return the writ. *Lanquit v. Jones, E. 4 G. Str. 87.*]

[On affidavit of debt's being levied, the bishop being dead, rule to his executor to return *feri facias de bonis ecclesiasticis*. *Ibid.*]

[Though a *levari facias de bonis ecclesiasticis* be a continuing execution, and a levy may be made under it from time to time *after it is returnable*, till the sum indorsed be satisfied; yet if it be *actually returned*, the authority of the bishop is at an end. *Marsh v. Farwett, C. P. M. 36 Geo. 3. 2 H. Bl. 582.*]

[Therefore where such a writ remained in the hands of the bishop long after it was returnable, who sequestered the profits of a vicarage, accruing as well before as after the return-day, and being ruled to return the writ, returned only the amount of the sum levied up to the *return-day*, the court would not order the writ and return to be taken off the file, but would only permit the return to be amended by inserting the sum levied, up to the time when the writ was *actually returned*. *Ibid.*]

[Attachment may issue against bishop for not returning *feri facias de bonis ecclesiasticis*. *Semb.* But it is more proper to move against his chancellor, commissary, or official, who usually return them. *Rex v. Bishop of St. Asaph, T. 25 & 26 G. 2. 1 Wils. 332.*]

But where the sheriff returns *clericus nullum habens laicum feodum*, without saying *beneficiatus*, a *capias* shall be granted to the sheriff against him; for it does not appear that he has a benefice, by which he may be warned by the bishop. *2 Inst. 4.*

So, upon a *feri facias* against a bishop, the sheriff ought not to return *clericus beneficiatus*; for he has temporalities. *Semb. Het. 20.*

So, if the return is *clericus beneficiatus*, the bishop cannot sequester his salary: as, fellow of a college by a mandate to the master, &c.; for that is no benefice. *R. 1 Sal. 320.*

So,

So, in other cases, an ecclesiastical person is not privileged from an arrest for a just cause. 2 *Rel.* 220. l. 40.

So, by the *st. M. Ch.* 1. all possessions and goods of ecclesiastical persons shall be freed from all exactions. 2 *Inst.* 2.

And by the *st.* 9 *Ed.* 2. *Art. Cleri.* 9. the goods of ecclesiastical persons shall not be distrained *in via regia, aut feodis ecclesiasticis quibus olim dotata.* 2 *Inst.* 4. 627.

So, by the *st.* 18 *Ed.* 3. (not printed) ecclesiastical possessions, acquired before 20 *Ed.* 1. were exempted from tenths and fifteenths granted by parliament to the king; because they were charged 20 *Ed.* 1. with tenths to the pope. 2 *Inst.* 628.

So, for tithes, which are spiritual, *nullus de reparatione pontis, aut aliquibus oneribus temporalibus onerari debet.* 2 *Inst.* 641.

And ecclesiastical persons shall be discharged of tolls, customs, average, pontage, paviage, &c. for their ecclesiastical goods. 2 *Inst.* 4.

And if they be molested, they may have a writ for their discharge. *F. N. B.* 227. *F. Reg.* 260.

So, for goods bought for their sustenance. *F. N. B.* 227. *F.*

So, they shall be discharged of purveyance for their own proper goods. 2 *Inst.* 3. 35.

And shall have the king's writ for their discharge. *F. N. B.* 30. *A.*

By the *st. M. Ch.* 9 *H.* 3. 21. *Nulla carecta dominica persone ecclesiastica, &c. per ballivos nostros capiatur.*—Confirmed, as to all purveyance, by the *st.* 14 *Ed.* 3. 1. 18 *Ed.* 3. 4. and 1 *R.* 2. 3. *Vide* 2 *Inst.* 35.

So, if an ecclesiastical person fears that his goods, or the goods of his farmer will be taken by any minister of the king, he may have a protection *cum clausula nolumus* for his security. 2 *Inst.* 4. *F. N. B.* 29. *A.*

So, an ecclesiastical person is capable of a temporal office: for where a petition was, that he should not be chancellor, treasurer, clerk of the privy seal, baron of the *Exchequer*, chamberlain of the *Exchequer*, comptroller, &c. the king answered, that he will do as he thinks fit. 2 *Rel.* 221. l. 5. *Vide supra.*

But the *st. M. Ch.* 9 *H.* 3. 1. confirms only the ancient rights of ecclesiastical persons; and does not give them any new ones. 2 *Inst.* 3.

So, notwithstanding *Art. Cleri.* 9. the goods of ecclesiastical persons may be taken for issues, or other dues to the king. 2 *Inst.* 627.

So, toll, &c. may be taken of them, if they merchandize; for the writ says, *dum merchandizas non exercent de eisdem.* *Cont. per Herle,* *F. N. B.* 227. *F.*

So, by express custom or prescription, tithes, &c. in the hands of a spiritual person may be charged to pontage, murage, &c. *Cal.* 101.

So, the clergy shall be liable to all charges imposed by act of parliament, if they be not exempted by the same act. *R.* 1 *Vent.* 273.

As, to rates made pursuant to *st.* 43 *El.* for relief of the poor.

So, they shall be bound by the statutes, which require the sending of carts and horses for the repair of the highway. *R.* 1 *Vent.* 273. *cited Lut.* 1563. 2 *Lev.* 139.

But a tax or subsidy charged upon a bishop, parson, &c. if he dies, shall not be a charge upon his successor, but upon his heir or executor only. *R. Lane,* 51.

So, by the *ſt.* 21 *H.* 8. 13. no ſpiritual perſon ſhall take to farm to himſelf or his uſe, from the king or others, by writing or *parol*, any lands, tenements, &c. for life, years, or at will, on pain of 10*l.* a month, &c.

Nor, ſhall take any annual rent or profit, by reaſon of ſuch leaſe or farm, &c. on pain of 10*l.* a month, and ten times as much as he or any to his uſe ſhall take in ſuch rent, profit, &c. a moiety to the king, the other, &c.

And ſuch leaſe, &c. to any ſpiritual perſon or his uſe ſhall be void, as well againſt the leſſor as the leſſee.

Nor ſhall, being beneficed with cure, occupy any parſonage or vicarage in farm of the leaſe of any other, nor take any rent or profit out of ſuch farm, on pain of 40*s.* per week, &c.

But by the ſame ſtatute, ſpiritual perſons may take to farm the temporalities of an archbiſhop, biſhop, &c. during vacation.

Or, if their glebe be not ſufficient, &c. may take in farm other lands for the expence of their houſes and hoſpitalities.

And may keep as much of their lands, &c. in right of their houſes, as ſhall be neceſſary for their cattle and corn, for the maintenance of their houſholds and hoſpitalities, without fraud.

And may take dwelling-houſes with orchards and gardens in a city, borough or town, for their own habitation.

So, if a ſpiritual perſon takes a leaſe for years, or at will, of lands, &c. it ſhall not be void. *R. Dy.* 358. a.

So, by the *ſt.* 21 *H.* 8. 13. no ſpiritual perſon ſhall buy, to ſell again for profit, in any market, fair, &c. any cattle, corn, lead, tin, hides, leather, tallow, fiſh, wool, wood, victual, or merchandize, on pain of treble value, &c. And ſuch contract ſhall be void.

Nor, ſhall uſe any tanhouſe, or brewhouſe, unleſs for ſervice of the houſe, on pain of 10*l.* per month, &c.

But by the ſame ſtatute, if a ſpiritual perſon buys without fraud, horſes, cattle, goods, &c. for his neceſſary uſes, and afterwards diſlikes them, he may ſell them again, &c.

[By *ſt.* 17 *G.* 3. c. 53. where there is no houſe, or it is ſo much out of repair that one year's neat income will not repair it, parſon, by conſent of patron and ordinary, may borrow two years neat income on mortgage for 25 years, which binds ſucceſſors. Interest and 5*l.* per cent. (or 10*l.* per cent. if non-reſident) ſhall be paid annually. If the incumbent do not apply, the ordinary may, where the living is 100*l.* per ann. and the parſon non-reſident.]

[If a parſonage or vicarage houſe be deſtroyed without any fault in the incumbent, the eccleſiaſtical court uſually orders a fifth part of the profits of the living to be ſet apart for re-building. *Sollers v. Lawrence*, *C. P. T.* 16 & 17 *Geo.* 2. *Willes*, 413.]

Eccleſiaſtical Cenfures.

Vide Prerogative, (D 12.)

Eccleſiaſtical Courts.

Vide Courts, (N 1, &c.)—*Diſmes*, (M 1, &c.)

Ecclesiastical Jurisdiction, and Laws.

Vide Prærogative, (D 9, &c.)

E G Y P T I A N S.

Vide Juslices, (S 9.)

EJECTMENT.

(A) By whom it lies.

AN ejectment lies by a lessee for years for recovery of his term, and damages, if he be ousted by his lessor, or a stranger. *F. N. B. 220.*

[It is a possessory remedy, and only competent where the lessor of plaintiff may enter; therefore it is necessary for plaintiff to shew his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it under some exception in 21 *J. 1. c. 16. Taylor v. Horde, H. 30 G. 2. 1 B. M. 60.*]

Of what things it lies, or not, and upon what demise, and how the judgment shall be. *Vide Pleader, (2 Z 1, &c.)*

But now the course is to make a nominal plaintiff upon a feigned demise.

And after the declaration delivered, the plaintiff may be changed by rule of court, before plea, if there be cause for it; as, if he be a witness upon the trial of the cause. *5 Mod. 333.*

[Ejectments are under the control of the court, and may be managed by them to answer every end of justice and convenience. *Fairclain v. Shamtitle, H. 2 G. 3. 3 B. M. 1290.*]

[And therefore, if by any means the plaintiff can be supposed to have a title as laid in the declaration, after verdict, the court will support the judgment: thus, if there be two demises of the same premises laid on the same day, the court of error in favour of the judgment will suppose that the demises were made by two joint-tenants, of the whole land, tho' each demise will pass only the respective moiety of him whose demise it is. *1 Wilf. 1.*]

[The court will not order a lessor, having privilege, to name a good plaintiff to be liable to costs, *Preston v. Lingen, M. 8 G. Str. 479.*]

[If a person claims land as lord, by *escheat*, the proper way to try the right is for him to bring ejectment; and the person claiming as heir shall defend either alone or with the tenant in possession. *Fairclain v. Shamtitle, H. 2 G. 3. 3 B. M. 1290.*]

[The formal title of a trustee shall not be set up against the *cestuy que trust*: but if the trustee is a trustee for mortgagees, and not for the defendant the mortgagor, he may recover. *Armstrong v. Peirse, P. 6 G. 3. 3 B. M. 1898.*]

[Where it is clear that the person in whom the *legal estate* is vested is a mere trustee, he shall not avail himself of his title to defeat his *cestuy que trust* from recovering in ejectment. *Doug. 721. 777.*]

[As

[As where a trust term is a mere matter of form, and the deeds mere muniments of another's estate; this shall not be set up against the real owner. 1 *Term Rep.* 759. n.]

[So, tenant in possession under a lease, whose tenancy is not meant to be disturbed by the lessor of the plaintiff in ejectment, shall never set up his lease to bar the recovery. *Id. ibid.*]

[So, a mortgagor shall not set up the title of a third person against his mortgagee. *Id. ibid.*]

[Nor, tenant against his lessor. *Id. ibid.*]

[Neither shall the surrenderor of a copyhold, before admittance, set up a formal objection against the surrenderee. *Ibid.* 600.]

[In such cases the jury may presume an old satisfied term surrendered to the *cestuy que use*, in order to substantiate a lease executed by him. *Borwerman v. Sybourn*, B. R. M. 37 Geo. 3. 7 T. R. 2. *Jones v. Jones*, B. R. M. 37 Geo. 3. 7 T. R. 47.]

[But if no such presumption be made, and it appear in a special verdict that such a term is still outstanding in a trustee, who is not joined in the action, the *cestuy que use* cannot recover. *Ibid.*]

[If B. claiming under A. let lands for a year to C., and die, and A. afterwards bring an ejectment against C., C. cannot dispute A.'s title. *Barwick v. Thompson*, B. R. H. 38 Geo. 3. 7 T. R. 488.]

[But a mere equitable title is insufficient to support an ejectment. 7 T. R. 2.]

[In ejectment the person having the legal title must prevail. *De Costa v. Wharton*, B. R. M. 39 Geo. 3. 8 T. R. 2.]

[And therefore a plaintiff, claiming under an *elegit* subsequent to a lease granted to the tenant in possession, cannot recover, tho' he give the tenant notice that he does not mean to disturb his possession, but only wishes to get into the receipt of the rents and profits. *Ibid.*]

[When the landlord is made defendant, the plaintiff must prove the defendant's tenant in possession of the premises. 1 *Wils.* 220.]

[The lessor of the plaintiff in ejectment is bound at the trial to prove the defendant in possession of the premises which he seeks to recover, although the defendant has entered into the general consent rule, if the defendant contest his possession. *Goodright v. Rich*, B. R. T. 37 Geo. 3. 7 T. R. 327.]

(B) By whom not.

BUT an ejectment does not lie by him, who has not an immediate interest or possession: as, if a lease be to A. for years, and afterwards to B. for years, and A. be ousted; B. cannot bring an ejectment. 1 *Rol.* 3.

So, it does not lie by him, who has only a possession in law: as, if lessee for years makes a lease at will to one, who is ousted; the lessee for years shall not maintain an ejectment. R. 1 *Rol.* 3. *Tanf. cont. but Co. acc. ibid.*

So, it does not lie by any one when his interest is determined; as, if a man covenants to stand seised of 100*l.* per ann. to the use of his daughters, till they raise 500*l.* for their portions *successive*; after 12 years the eldest daughter cannot enter or have an ejectment, tho' her portion was not raised; for that would be to the prejudice of the other daughters. R. *Cro. El.* 800.

[Twenty years *adverse* possession in defendant, takes away plaintiff's right of possession, as well as his action or remedy by ejectment. *Taylor v. Horde*, H. 30 G. 2. B. M. 60.]

By the *st.* 4 Geo. 2. 28. if half a year's rent be due, the lessor having title of re-entry may, without legal demand or re-entry, serve an ejectment, and on judgment against the casual ejector, or nonsuit for not confessing lease, entry, and *ouster*, on proof by *affidavit*; or, if defendant appear, on proof at the trial, that half a year's rent was due, and no sufficient distress, and he had title to re-enter, the plaintiff shall have judgment and execution; and after six calendar months after execution and no payment of arrears and costs, the lessee, or any claiming under him, shall have no relief in equity.

[Under this statute a landlord cannot, under a clause of re-entry, recover in ejectment, if there be a sufficient distress on the premises; neither can he recover at common law, unless he demand the rent on the day when it becomes due. *Foster v. Wandless*, B. R. H. 37 G. 3. 7 T. R. 117.]

[A. by will gave a leasehold estate to B., his executors, &c. subject to a rent-charge to his wife during her widowhood, *with power to the widow* to enter for non-payment, and to enjoy, &c. till the arrears were satisfied; and after the widow's marriage or death, he willed that B. should pay the rent-charge to C., his executors, administrators, and assigns: the widow married, on which C. received the rent-charge during his life, and then C. died, without disposing of the rent-charge, appointing D. his executor; held that D. had no right of entry for non-payment of the rent-charge. *Hassell v. Gowthwaite*, C. P. M. 18 Geo. 2. Willes, 500.]

[If D. had had a right of entry, a demand would have been necessary. *Ibid.*]

Provided, a mortgagee not in possession shall not be barred, if, in six calendar months after execution, he pay all arrears and costs, and perform the covenants of the lease.

[By the *st.* 11 G. 2. 19. the tenant, to whom a declaration in ejectment shall be delivered, shall forthwith give notice to his landlord on pain of forfeiting the value of three years improved rent.]

[And the court may suffer the landlord to make himself defendant by joining with the tenant: but in case the tenant shall neglect to appear, judgment shall be signed against the casual ejector; but if the landlord shall desire to appear by himself, and consent to enter into the common rule, the court shall permit him so to do, and order a stay of execution upon the judgment against the casual ejector till further order.]

[If a landlord serves tenant with ejectment under 4 G. 2. c. 28. and has judgment by default, and possession delivered, and tenant tenders no rent, nor files bill for relief, but several years after brings ejectment against the landlord, he shall not recover; tho' at his second ejectment no affidavit is *produced* that half a year's rent was due, and no sufficient distress countervailing the arrears. *Doe v. Lewis*, T. 31 G. 2. 1 B. M. 614. (for it shall be presumed that an affidavit was regularly made, and that all the requisites of that act were duly complied with).]

[A. covenants that B. (a partner) shall live in his house, and that if

if *A.* dies, his executor shall renew the lease. *A.* cannot recover.
Right v. Proctor, P. 8 G. 3. 4 B. M. 2208.]
Vide Estates, (H 9.)—*Pleader*, (2 Z 1, &c.)

Ejectment of Ward.

Vide Guardian, (H 2.)

ELECTION.

(A) Election; who shall have it.

(A 1.) He, who ought to do the first Act.

IF an election be given to another of two several things, he, who ought to do the first act, shall have the election; as, if a man grants to another to have a rent, or a robe yearly at such a feast, the grantor has an election to deliver the one or the other. *Co. L.* 145. a.

[Where one of two things is to be performed, the option is in the person who is to perform it. *Layton v. Pearce*, B. R. M. 19 Geo. 3. *Deugl.* 15.]

If an obligation be with condition, *that if the obligor work out the 40 l. in packing when the obligee hath occasion to employ him, or pay the 40 l. then, &c.* the obligee hath election to take the 40 l. in work or money. *R. 2 Mod.* 304.

If a father having three daughters grants to *A.* the disposition of the marriage of one of them; the father shall choose of which daughter *A.* shall have the marriage. *R. per all the J. Dal.* 73.

[If *A.* enfeoffs *B.* of the manor of *D.*, except a close named *N.*, and there are two closes named *N.*, one nine acres, the other three acres; the feoffor shall choose which close he shall have. *R. 1 Len.* 268.]

So, if a man leases, rendring rent, or a robe; the lessee has an election to pay the one, or the other; for he is to do the first act. *Co. L.* 145. a.

So, if a man grants out of his wood so many cart-loads of maple, or hazle; the grantee has the election to take the one, or the other. *Co. L.* 145. a.

If he grants one of the horses in his stable; the grantee has an election to take which he pleases. *Co. L.* 145. a.

If a man conveys two acres, the one for life, the other in fee, the grantee has an election to take the one, or the other. *1 Rol.* 725. l. 45.

So, if he levies a fine of ten acres out of 100, the conusee has the election. *R. 1 Rol.* 725. l. 35.

Or, if the conusee renders back to the conusor for years, the conusor shall have the election. *R. 1 Rol.* 725. l. 40.

If a man covenants to make an estate at the costs of *B.* in fee, he shall chuse what conveyance he will make; for he is to do the first act; viz. give notice what conveyance he will make. *2 Mod.* 75. *Vide post.* (A 2.)

(A 2.)

[A 2.] *Who shall do the first act.*] If a man be bound to make an assurance, he who is bound to make it, ought to do the first act. *Co. El. 718. Vide Condition (H). Vide ante, (A 1.)*

Tho' it is to be made at the charge of the covenantee, obligee, &c. *R. 5 Co. 22. b.*

Tho' the covenant be to make a particular conveyance; as, a feoffment, &c. *R. 5 Co. 22. b. R. cont. Mo. 22.*

If bound to make a lease to *A.* for three lives, which *A.* shall name; *A.* shall do the first act. *R. 2 Mod. 75.*

So, if the condition of an obligation be in the disjunctive, the election shall always be in the obligor; for the condition was for his benefit. *2 Mod. 201. R. 3 Lev. 137.*

Tho' in one part of the disjunctive the obligee ought to do the first act. *2 Mod. 201.*

If a man has several remedies for the same thing, he has an election to use which he pleases. *Co. L. 145. a.*

If a conveyance operates several ways, the grantee, &c. may take it as he pleases: as, if a man conveys to *A.* by bargain and sale, and by fine, he may take by which he pleases, if both are completed together. *Semb. 4 Co. 72. a.*

If by demise, bargain and sale, the lessee may take by common law, or by way of use. *R. 2 Co. 35. b.*

But a man by his wrong or default may lose his election, and give it to the feoffee, &c.: as, if a man grants so much to be taken by assignment; if the grantor does not assign at the day, the grantee may take it in what part of the wood he pleases, without assignment. *R. 1 Rol. 725. l. 30.*

If a man enfeoffs another of two acres, the one for life, the other in fee, and he makes a feoffment of both; the feoffor may enter for the forfeiture in the one, or the other. *Co. L. 145. a.*

If a man grants a rent or a robe, at such a feast, and does not deliver it at the day; the grantee may demand which he pleases. *Co. L. 145. a.*

So, if lessee, rendring rent, or corn, does not pay, the lessor shall have which he pleases. *R. 1 Rol. 725. l. 25.*

Yet, if the thing, of which the election is given, is to have continuance, a failure *unica vice* does not devolve the election upon the other: as, if *A.* grants an annuity, or a robe, to *B.*, to be paid at *Easter annuatim* for his life; if *A.* does not pay, *B.* shall not have a writ of annuity for the one only, but for the one or the other, in the disjunctive. *Co. L. 145. a.*

(B) At what Time Election shall be made.

IF the thing, of which the election is given, is to be done *unica vice*, the election ought to be at the time. *Co. L. 145. a.*

So, if nothing passed or vested in the grantee, &c. before his election, it ought to be made in the life of the parties. *Co. L. 145. a.*

As, if a man gives to *A.* such of his horses as *A.* and *B.* shall chuse, the election ought to be in the life of *A.* *1 Rol. 726. l. 2.*

But where an interest vests immediately by the grant, &c. election may be made by the heir or executor, as well as by the party himself. *Co. L. 145. a.*

As,

As, if a fine be of 100 acres, and the conusee renders 50 to the conusor for years; his executor may chuse which 50 he will have. *R. 1 Rol. 725. l. 47.*

If a man gives one of his horses to *A.* and *B.*; after the death of *A.*, *B.* may chuse which he will take: for an interest vested in them immediately by the gift. *1 Rol. 725. l. 52.*

So, if the election determines only the manner or degree in which he shall have the thing; his heir or executor, as well as the party himself, may make it: for in such case the interest vests immediately. *Co. L. 145. a.*

As, upon a grant of a rent-charge, the heir or assignee may elect to have it, as an annuity, or as a rent. *Co. L. 144. b.*

So, if the thing, of which election is given, is annual, and to have continuance, the heir or executor may make the election.

(C) Determination of an Election.

(C 1.) What shall be.

A Determination of a man's election shall be made by express words, or by act.

As, if a man, who has election to have a fee in one acre, or another, makes a feoffment of one of them; this determines his election. *1 Rol. 726. D.*

If he leases two acres, remainder of one of them in fee, and afterwards gives licence to the lessee to cut trees in one; this amounts to an election to have the fee in the other. *Pl. Com. 6. b. 1 Rol. 726. l. 10.*

If a covenant be to pay tithes in kind, or 20 s. at the election of a prebendary; by the dissolution of the prebend, and corporation which ought to pay, the election is gone. *R. Hard. 387.*

(C 2.) What not.

But if a man has his election to take by the common law, or by way of use, a general entry does not determine his election. *R. 2 Co. 37. b.*

If by grant an abbot has his election to pay tithes, or such a sum for them; the election, by the dissolution, goes to the king and his patentee. *Hard. 383.*

If a man once determines his election, it shall be determined for ever: as, if an obligation delivered to the use of *A.* be refused when he is first informed of it, he cannot afterwards accept it. *R. 1 Rol. 726. l. 15.*

If a man distrains for rent, he shall never after have annuity; nor, *vice versa.* *Vide Co. L. 145. a. b. Vide Annuity, (C 1, &c.)*

So, if several persons have an election, he who first makes election, determines it for ever. *Co. L. 145. a.*

But where an election is of several remedies, if he chuses one, he may afterwards have the other in personal cases: as, where he has election of several actions. *Co. L. 146. a.*

[A party having a mortgage and also a bond, as a security for the same debt, may bring an action on the bond, and arrest the defendant,

ant, pending a suit in equity for a foreclosure. *Burnell v. Martin*,
B. R. T. 20 Geo. 3. Dougl. 417.]

*Vide more, as to election of remedies, in Action, (M 1, &c.)—
 Annuity, (C 1, &c.)—Audita Querela (D).*

Guardian by Election.

Vide Guardian, (F 1, 2.)

Election of Justices of Peace.

Vide Justices of Peace, (A 3.)

Election in a Corporation.

Vide Franchises, (F. 20, &c. 29.)—Mandamus, (C 2.)

Election to Parliament.

Vide Parliament, (D 8, &c.—E 15.)—Scotland, (D 4, 5.)

ELEGIT.

Vide Execution, (C 14.)—Process, (E 6.)

ELOPEMENT.

Vide Dower, (F 2.)—Pleader, (2 Y 11.)

E L Y.

Vide Franchise, (D 8.)

E M B L E M E N T S.

Vide Biens, (G 1, 2.)

E M B R A C E R Y.

Vide Maintenance.

ENACTING OF LAWS.

Vide Parliament, (G 10, &c.)—Prerogative, (D 1.)

E N C L O S U R E.

Vide Droit, (M 1, 2.)

E N D O W M E N T.

Vide Dower.—Ecclesiastical Persons, (C 10, &c. 13.)

E N F A N T.

(A) Infant ; who shall be.

BY the common law, a male or a female is called an infant till the age of 21 years. *Co. L. 171. L. b.*

But by the civil law the age of 17 years.

So, a man, born the first of *February* 1600, after eleven o'clock at night, might make a will, &c. after one o'clock in the morning of the last day of *January*, anno 1621; for he was then of full age. *Per Holt, 1 Sal. 44.*

(B) What he may do.

(B 1.) May purchase.

AN infant has capacity to purchase lands or tenements during his infancy; for *primâ facie* it shall be intended for his benefit. *Co. L. 2. b.*

And therefore, if a feoffment be made to an infant, and livery to him in person, it shall be good till it be avoided.

So, if an infant makes a letter of attorney to take livery, and livery is made to him by attorney; for it shall be intended for his profit. *R. 1 Rol. 730. l. 10.*

(B 2.) May levy a Fine, or suffer a Recovery.

So, if an infant by fine conveys his estate to another, the estate passes by fine till it be avoided.

And, if he declares the uses by deed, the declaration of the uses stands good as long as the fine is in force; for he has power to declare the uses, as incident. *2 Co. 58. a. Per two Ch. J. 10 Co. 42. b. R. 1 Rol. 730. l. 50. Dal. 47.*

[If infant covenants to levy a fine at such a time, to such uses; before the time he comes of age, levies the fine, and by another deed made at full age declares it to other uses; the last deed shall lead the uses. *Str. 94.*]

And tho' the infant dies after the king's silver paid, the ingrossing shall not be stayed; for it is then a fine. *Per three J. Dy. cont. Dy. 220. b. Dal. 56.*

So, if an infant suffers a common recovery, and comes in as vouchee in person, or by attorney, the estate passes till the recovery be reversed. *2 Inst. 483.*

And if he comes in as vouchee by guardian, he shall be bound by it. *Cont. 10 Co. 43. a. R. acc. Cro. Car. 307. Hob. 197. 1 Rol. 731. l. 5. 751. l. 50. 752. l. 1. Jon. 318. R. Godb. 161. Acc. 1 Leo. 211. 1 Sid. 321. R. Cro. El. (471, 2.)*

And the king, upon petition, may admit an infant to suffer a recovery by his guardian. *1 Ver. 461. Ley, 83.*

But such admittance ought not to be granted, except upon urgent necessity. *R. Sal. 567.*

So, if an infant makes a feoffment and livery in person, the feoffment is good till it be defeated. *2 Rol. 2. l. 37. 40. 2 Inst. 483.*

(B 3.) May make an Exchange, Lease, &c.

So, if an infant exchanges his land, and occupies the land given in exchange; it shall be good till it be defeated; for it is tantamount to a livery. *Co. L. 51. b.*

So, if an infant makes a lease for years rendring rent, it shall be good till it be defeated. *Co. L. 308. a. 1 Rol. 729. l. 55.*

[If *A.* devises land and houses thereon, to six children, all infants, and the mother, acting as guardian, grants a building lease for 41 years, and the eldest son aged 19 joins in it, and covenants for quiet enjoyment, and that the others when of age shall confirm, and they all attain 21, and accept the rent for 10 years after; a court of equity will establish the lease. *Smith v. Low, T. 1739, 1 Atkyns, 489.*]

[By *§. 29 G. 2. c. 31.* infants, lunatics, and *feme-coverts*, may apply by petition to Chancery, &c. and by leave surrender leases by deed, in order to renew the same.]

(B 4.) A Statute, or Recognizance.

So, if an infant acknowledges a statute, or recognizance; it shall be good till it be defeated. *10 Co. 43. a. Bend. pl. 123.*

(B 5.) A Contract for Necessaries.

So, if an infant makes a contract for necessaries, it binds him. *Co. L. 172. a.*

As, if he contracts to pay for his eating and drinking. *Co. L. 172. a. R. Jon. 182.*

Or, contracts generally for his table, or with his brewer for drink. *R. 1 Rol. 729. l. 6. R. Latch, 157. Dy. 104. b. in marg.*

So, if he contracts for necessary apparel. *Co. L. 172. a. 1 Rol. 729. l. 5.*

Or, with a taylor to make clothes. *R. Latch, 157. R. Jon. 146. Dy. 104. b. in marg.*

And if he brings the materials to the taylor, there is no need to aver that they were suitable to his quality. *R. Latch, 157.*

So, if he contracts for physic. *Co. L. 172. a.*

Or, for his cure with a surgeon, when he is wounded. *Pal. 528.*

Or, for billets and firing. *1 Rol. 729. l. 30.*

Or, for his schooling, or instruction in reading and writing, &c.

Co. L. 172. a. R. 1 Sid. 112. Mar. 40.

Or, for all together, diet, apparel, washing, lodging, and schooling. *R. Pal. 528.*

Or, in consideration that *A.* had expended 7 *l.* for diet and teaching, to pay 7 *l.* *R. Jon. 182.*

So, a contract, to pay so much *per ann.* for his diet and schooling, is good. *R. 1 Rol. 729. l. 35.*

Or, if he be a housekeeper, to find victuals, &c. for his family. *1 Sid. 112.*

[Necessaries for an infant's wife, are necessaries for him, but not if provided in order for the marriage. *Turner v. Trisby, P. 5 G. Str. 168.*]

And, upon such contract by an infant, an *assumpsit* lies. *R. Latch, 169. Jon. 146. Pal. 528.*

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Or,

Or, if he gives a single bill for money upon such contract, it binds him. 1 *Rol.* 729. l. 20. *Cro. El.* 920. *R.* 1 *Lev.* 86.

So, if he accounts upon such contract, an *assumpsit* lies upon an *infirmul computasset*. *Pal.* 528. *Dub.* [*Trueman v. Hurst*, *B. R. M.* 26 *Geo.* 3. 1 *T. R.* 40. *cont.*]

The court shall be judge what things are necessary. *Cro. El.* 583.

[If goods, not necessities, are delivered to an infant, who after full age promises to pay, he is bound. *Southerton v. Whitlock*, *H.* 12 *G. Str.* 690. *Borthwick v. Carruthers*, *B. R. E.* 27 *Geo.* 3. 1 *T. R.* 648.]

(B 6.) May do Things necessary.

So, an infant may do things necessary to be done for the public good; as, he shall be sworn to the king in the leet, after the age of 12 years. *Co. L.* 172. b. *Vide Chancery*, (3 *R.* 3, &c.)

May do homage. *Co. L.* 65. b.

And present to a church to avoid a lapse. *Co. L.* 172. a.

So, an infant may do a thing, to which he is bound or compellable by law. *Co. L.* 172. a.

As, he may assign dower. *Co. L.* 35. a.

So, an infant may maintain an action against a man of full age upon mutual promises of marriage. *Dub. F. g.* 275.

[Infant may sue on a contract of marriage with a person of full age, tho' infant cannot be sued. *Holt v. Ward*, *Clarencieux*, *T.* 5 & 6 *G.* 2. *Str.* 937.]

So, he shall maintain *assumpsit*, covenant, &c. upon mutual promises or covenants, tho' he himself is not bound by his promise or covenant on the other part. *R.* 1 *Sid.* 41. 446. *Vide Action upon the Case upon Assumpsit*, (B 14.)—Covenant, (B 1.)

[So, he may be the lessor in an ejectment, but then he must give security for costs. 1 *Wilf.* 102.]

[But if his guardian undertake for costs, it is sufficient. *Cowp.* 128.]

A fortiori, where the money or consideration on the part of the infant is paid, and the consideration executed. *Cont. per Winch*, 1 *Rol.* 19. l. 15. *Acc. per Hob.* 77. *R.* 1 *Sid.* 41. *R.* 1 *Vent.* 51. 1 *Mod.* 25.

So, by custom, an infant may make a feoffment at the age of 15 years, which shall not be defeated.

Or, a lease for years. *Co. L.* 45. b.

But a custom, that an infant may make a feoffment, grant, &c. when he can measure an ell of cloth, or count twelve pence, is void. *Godb.* 14.

[*A.* mortgages to *B.* who dies, leaving *C.* his son and heir-at-law an infant, and *D.* his widow, joint-executors, *A.* borrows more money of *E.*, and with part pays off *C.* and *D.*, who by lease and release convey to *E.*, this conveyance binds *C.* the infant. *Zouch v. Parson*, *M.* 6 *G.* 3. 3 *B. M.* 1794.]

[The acts of an infant which do not touch his interest, but take effect from an authority which he is trusted to exercise, are binding. *Ibid.*]

[The infant's privilege shall never be turned to a weapon of fraud or injustice. *Ibid.*]

(C 1.) What he cannot do.

BUT an infant cannot, generally, do an act which requires an oath; as, he cannot do fealty. *Co. L. 65. b. Vide Devise, (H 2.)* Shall not be sworn upon an inquest. *Co. L. 157. a. 172. b.*

Cannot wage his law. *Co. L. 172. b.*

Nor, make his law of *non-summons*. *Co. L. 172. b.*

So, he cannot do a thing which requires skill and ability; as, he cannot do the service of grand serjeantry at the coronation, but by deputy. *Co. L. 107. b.*

[An infant cannot be a mayor of a corporation, nor elected a burgess of one. *Semb. Rex v. White, M. 7 G. 2. B. R. H. 8.*]

So, he cannot be steward of a manor, nor take a grant of that office in possession or reversion. *Co. L. 3. b. R. 1 Rol. 731. l. 40. Cro. El. 637.*

Neither can he be bailiff or receiver; for he has not skill to render an account. *Co. L. 172. a.*

[Neither can he be elected a burgess (of *Portsmouth*) tho' he be not sworn in till after age. *Corup. 226.*]

But an infant may take a grant of the stewardship of a manor, *exer-cundum per se aut deputatum*. *R. Cro. Car. 279. Vide Copyhold, (R 5.) Vide Officer, (B 3.)*

(C 2.) What Act by him is void.

So, an infant cannot do an act apparently to his prejudice: as, he cannot make a lease, not rendring rent; for such lease shall be void. *1 Rol. 729. l. 52. R. Mo. 105. Semb. Cro. El. 220.*

So, a feoffment by an infant, with livery by letter of attorney, is void. *Perk. Grant. 13.*

So, a feoffment by himself to his guardian in socage, upon a presumption of fraud. *1 Rol. 728. l. 32.*

So, generally, every deed by an infant; as, a grant of a rent-charge, annuity, &c. *Perk. Grant, 13. 3 Mod. 310.*

A surrender by him, of a term for years, to him in reversion or remainder. *R. 1 Rol. 728. l. 35. Cro. Car. 502.*

Tho' the surrender be by acceptance of a new lease upon the same rent. *1 Rol. 738. l. 40. R. Cro. Car. 502.*

Tho' the deed be delivered with his own hand. *Cont. 2 Rol. 21. l. 10.*

[A joint warrant of attorney, given by the infant and another, may be vacated against the infant only. *2 Bl. Rep. 1133.*]

[An infant cannot execute a power over a real estate. *Hearle v. Greenbank, P. 1749, 3 Atkyns, 695. 1 Vesey, 298.*]

[Therefore, if a father devises his real estate to trustees, to apply the rents to the sole use of his daughter, notwithstanding her coverture, and to permit her by any deed or writing to give, devise, and bequeath the same, notwithstanding her coverture, as she should think fit; her will made during her infancy is not a good execution of this power. *Ibid.*]

So, regularly, a contract by an infant, if it be not for necessities, shall be void. *Vide ante, (B 5.)*

And therefore, a covenant by an infant to bind himself apprentice, does

does not bind, except when it is warranted by the custom of *London*, or by the *st. 5 El. 4. D. Cro. El. 653. 2 Cro. 494. Vide Justices of Peace, (B 55.)*

And if he be an apprentice pursuant to the custom or the statute, he is not bound by a collateral covenant. *Cro. El. 653. R. Cro. Car. 179.*

So, a promise by him or another, in consideration of forbearance of a debt due by him during his infancy, is void. *Vide Action upon the Case upon Assumpsit, (B 1.—F 8.)*

So, if an infant be a mercer, &c. and buys goods and wares for the use of his shop, the contract does not bind him. *R. 1 Rol. 729. l. 15. Dy. 104. b. in marg. R. 2 Cro. 494. [Whywall v. Champion, M. 11 G. 2. Str. 1083.]*

If he borrows money, tho' he afterwards employs it for necessities. *1 Sal. 279.*

Or, it was lent to him for necessities; for the lender ought to provide them. *R. 1 Sal. 386, 7.*

So, if an action be for money lent and laid out, and the defendant pleads, *within age*, and the plaintiff replies, for necessities; for he does not answer to the loan. *R. 5 Mod. 368.*

So, if an infant trades as a merchant, and gives a bill of exchange, it shall be void. *R. Carth. 160.*

So, if an infant gives an obligation for a sum due for necessities, it shall be void. *Co. L. 172. a. R. Cro. El. 920. Mo. 679. Adm. 1. Lev. 86.*

Or, accounts for necessities bought, and an action upon *assumpsit* is brought for necessities due upon account. *2 Rol. 271.*

[An infant who lives with his parent, and is properly maintained by him, cannot bind himself to a stranger, even for necessities. *2 Bl. Rep. 1325.*]

So, if an infant sells goods, the sale is void; and if the vendee takes them, trespass lies against him. *1 Mod. 137. Vide post. (C 3.)*

If he loses money at gaming, and the winner takes it, *trover* lies. *F. g. 279.*

[The court, on motion, will set aside a judgment on a warrant of attorney executed by an infant. *Wilmot v. Bye, T. 10 & 11 G. 2. B. R. H. 376.*]

[All gifts, grants, or deeds, which do not take effect by delivery of his hand, are void. *Zouch v. Parsons, M. 6 G. 3. 3 B. M. 1794.*]

[A lease on which no rent is reserved is not *absolutely* void. Infant may make lease, without rent, to try his title. *Ibid.*]

[Lessee can in no case avoid the lease on account of the lessor's infancy, therefore not void. *Ibid.*]

[A surrender by deed is not *absolutely* void; infant surrenders unprofitable lease, lessor accepts, the premises are burnt, he cannot say the surrender is void. The *other party* to a deed can in no case object on account of infancy. *Ibid.*]

[If there should be a new case, where it would be more beneficial to have it void, (as if he might otherwise be subject to forfeiture, damages or breach of trust,) the reason of the privilege would warrant exception to this general rule. *Ibid.*]

[By *st. 17 G. 3. c. 26.* annuity granted by infant void, tho' attempted to be confirmed when of age.]

[To

[To solicit infant to grant annuity punishable by fine, imprisonment, or corporal punishment.]

(C 3.) What only voidable.

So, generally, every purchase by an infant is voidable. *Co. L. 2. b. Vide ante, (B 1.)*

And a conveyance by fine, common recovery, feoffment, exchange, &c. *Vide ante, (B 2, 3.)*

So, a lease for rendring rent. *F. g. 279. Vide ante, (B 3.)*

A statute, or recognizance. *Vide ante, (B 4.)*

So, a lease of a copyhold without licence, rendring rent. *R. Latch, 199.*

So, if an infant bails goods to his own use, it is only voidable; for trespass does not lie against the bailee. *1 Rol. 730. l. 20.*

So, if he sells goods, and delivers them with his own hands, trespass does not lie against the vendee. *1 Mod. 137. Vide ante, (C 2.)*

[All gifts, grants, or deeds, by matter in deed, or in writing, which do take effect by delivery of his hand, are voidable by himself, his heirs, or those who have his estate. *Zouch v. Parsons, M. 6 G. 3. 3 B. M. 1794.*]

[The true ground why an infant's deed is only voidable, is the solemnity of the delivery. *Semb. ibid.*]

[But if otherwise, if infant receives mortgage-money, and conveys, it is such semblance of benefit as makes conveyance only voidable. *Ibid.*]

[If an agreement, made by an infant, be for his benefit at the time, it shall bind him. *Maddon v. White, B. R. M. 28 Geo. 3. 2 T. R. 159.*]

[A contract made by an infant, which is for his own benefit, is only voidable by the infant himself, and cannot be taken advantage of by a third person. *Keane v. Boycott, C. P. E. 35 Geo. 3. 2 H. Bl. 511.*]

[If a person jointly interested with an infant in a lease, obtain a renewal to himself only, and the lease prove beneficial, he shall be held to have acted as trustee, and the infant may claim his share of the benefit; but if it do not prove beneficial he must take it upon himself. *Ex parte Grace, C. P. H. 39 Geo. 3. 1 Bos. & Pull. Rep. 376.*]

(C 4.) *How avoided.* By *dum fuit infra ætatem.* If an infant aliens in fee, in tail, or for life, by conveyance *in pais*, he at his full age, or his heir, may avoid it by a writ of *dum fuit infra ætatem*. *F. N. B. 192. G. Vide Dum fuit infra Ætatem (A).*

And it lies in the *per*, in the *per & cui*, or in the *post*. *F. N. B. 192. H.*

So, it lies by the heir, tho' he be within age. *F. N. B. 192. I.*

So, if husband and wife alien the land of the wife, both being infants; the wife, after the death of her husband, may have a *dum fuit infra ætatem*. *F. N. B. 192. K. Co. L. 337. a.*

So, if they join in an alienation where the wife only was an infant; after the death of her husband, she may have a *dum fuit infra ætatem*, as well as a *cui in vitâ*. *Dub. F. N. B. 192. L.*

But if joint-tenants, infants, join in an alienation, they cannot join in a *dum fuit infra ætatem*. *F. N. B. 192. K.*

And if one of them aliens, the survivor shall not have a *dum fuit*, &c. for the jointure was severed, but the heir of the alienor. *F.N.B.* 192.

(C 5.) *By entry, &c.*] So, an infant, or his heir, may avoid his feoffment, &c. by entry, when the entry is not tolled. *F.N.B.* 192. G.

If a husband within age makes a feoffment of the land of his wife, and dies, she may enter. *Lit. f.* 633.

But if the alienation was by fine, recovery, &c. which are matters of record, it must be avoided by error.

So, a statute, recognizance, &c. by an infant, shall be avoided by *audita querela*.

So, an obligation, or other deed, shall be avoided by plea of *within age*; for it cannot be said, *non est factum*.

(C 6.) *How affirmed.*] If an infant continues in possession, after his full age, of lands demised to him during his minority, he affirms the lease. *R. 1 Rol. 731. l. 45.*

If an infant affirms a lease to him, after his full age, he shall be liable to the arrears of rent incurred before. *R. 1 Rol. 731. l. 50. 2 Cro. 320. 2 Bul. 69. Godb. 365.*

So, during his infancy, if he occupies by virtue of the lease. *R. 2 Bul. 69.*

(C 7.) *When it cannot be affirmed.*] But if the estate, &c. to the infant was void, it cannot be affirmed by his agreement at full age; as, if a lessee, being an infant, takes a new lease, to commence at a future day; this shall not be a surrender, tho' at full age it commenced, and he then entred and claimed by this new lease. *R. 1 Rol. 728. l. 40.*

If he sells his term, the sale shall not be affirmed, tho' he accepts part of the money after his full age. *R. Dal. 47.*

(C 8.) *By whom avoided.*] A feoffment, or other alienation by an infant, may be avoided by himself.

Or, by any privy in blood; as, by his heir. *8 Co. 42. b.*

Tho' he be a special heir who takes *per formam doni*, and not heir general. *8 Cg. 43.*

But it shall not be avoided by a privy in estate; as, by the lord by escheat. *3 Co. 43.*

(C 9.) *At what time. Within or after full age.*] A feoffment, or other alienation *in pais*, by an infant, may be avoided by him or his heir at any time by entry; be it within age, or after his full age. *Co. L. 380. b.*

Tho' it be by indenture of bargain and sale inrolled. *2 Inst. 673.*

[If infant makes feoffment, or conveys by lease and release, and re-enters within age, still the feoffment or conveyance is only voidable, and he may elect to confirm it when of full age; therefore a stranger cannot avail himself of infant's entry, for he cannot elect for him. *Zouch v. Parsons, M. 6 G. 3. 3 B. M. 1794.*]

So, a judgment against an infant may be avoided, before or after his

his full age, by error, for that he appeared by attorney, being an infant, and not by guardian; for it shall not be tried by inspection, but by the country. *R. 2 Rol. 573. l. 15. 25. 45.*

(C 10.) *After full age.*] But a *dum fuit infra etatem* does not lie by an infant himself during his nonage. *F. N. B. 192. G. Vide ante, (C 4.)*

(C 11.) *During his nonage.*] So, matter of record, which ought to be tried by inspection, cannot be avoided after his full age.

And therefore, a fine or recovery by an infant ought to be reversed by error during his nonage. *2 Inst. 483, 4. 673. Co. L. 380. b. Semb. 1 Lev. 142.*

Or, upon examination and inspection of the infant, it shall be vacated. *R. Skin. 24.*

And the inspection ought to be before his full age. *Semb. 2 Cro. 230.*

So, a statute or recognizance ought to be avoided by *audita querela* during his nonage. *Co. L. 380. b. 2 Inst. 673. R. 1 And. 25. Bend. 80.*

But if he be inspected during his nonage, and it be recorded that he is within age, the judgment for reversal may be after his full age. *Co. L. 380. b.*

When trial shall be by inspection, and how, *vide Trial, (B 1, &c.)*

(D) The Privileges of an Infant.

(D 1.) When the *Parol* demurs.

IN all actions *ancestral rightful*, when a bare right descends to the infant from his ancestor, the *parol* demurs till his full age; without other plea, except the prayer of the tenant that the *parol* may demur; for he shall not be in danger of a perpetual bar of his right for want of knowledge. *R. 6 Co. 3. b.*

[An infant cannot pray the *parol* to demur in any other stage of the proceedings than at the time of pleading. *Derisley v. Custance, B. R. M. 31 Geo. 3. 4 T. R. 75.*]

[And affidavit of infancy is not necessary: plaintiff may reply full age. *Barnes, 267.*]

As, in a writ of right. *6 Co. 3. b.*

In a *formedon in reverter*. *Ibid.*

Or, remainder. *2 Inst. 291. Vide 6 Co. 4. a.*

So, in a *dum fuit infra etatem*, or *non compos*, by an heir within age; for a right descends from the ancestor. *6 Co. 4. a. 2 Inst. 291.*

So, an extent shall not be against an infant upon a statute, or recognizance, by his ancestor, during his nonage.

And if it be against the ancestor, and the sheriff returns that he is dead, and the heir within age, he shall be aided by an *audita querela*. *Mo. 37.*

So, by the common law, in actions *ancestral possessory*, (where the ancestor died in possession,) by an infant, if the tenant pleads such a plea as shews that nothing, or only a bare right, descended to the infant, so that it is like to an action *ancestral rightful*, he may pray that the *parol* may demur; but not without such plea. *R. 6 Co. 4. a.*

As, in *cofinage*, *aiel*, *befaiel*, &c. till the *ft. Glo.* 2. 6 *Co.* 4. a.

So, in a *quid juris clamat*, if the tenant alleges a grant to be, without impeachment of waste, and saving his privilege, &c. 6 *Co.* 4. b.

So, in waste if he pleads such a deed; for the infant cannot try the deed, &c. 6 *Co.* 4. b.

So, in a *formedon in descender*, if the tenant alleges a feoffment from the ancestor, with warranty and assents. 2 *Inst.* 291.

[If lands in fee descend on an infant, the *parol* shall demur in equity as in law; but where a lease is made to a man and his heirs during three lives, the heir does not take by descent but as special occupant, and shall not demur. *Chaplin v. Chaplin*, T. 1735, 3 *P. W.* 365.]

(D 2.) When not.

But in an action *possessory* by an infant, the tenant, tho' he pleads such plea, cannot have the *parol* demur for his nonage. R. 6 *Co.* 3. b.

Tho' it be a real action for land which he has by descent, and the tenant pleads a deed, or warranty, of his ancestor; as, in a writ of right of a *deforcement* to the infant himself. 6 *Co.* 3. b.

In *escheat*, *cessavit*, writ of right upon a *disclaimer*, where he has the seigniori in possession. 6 *Co.* 3. b.

In a *mortd'ancestor*, or other assise; for the jury appears the first day, and it is *festinum remedium*. 6 *Co.* 4. b.

So, now, by the *ft. Glo.* 6 *Ed.* 1. 2. in *mortd'ancestor*, *cofinage*, *aiel*, or *befaiel*, the *parol* shall not demur for the nonage of the demandant. 2 *Inst.* 290. 6 *Co.* 4. a.

Nor, by the *ft. W.* 1. 47. in a writ of entry *sur disseisin* by the heir of the disseisee. 2 *Inst.* 258. 6 *Co.* 4. b.

Nor, in an appeal by an infant; tho' the infant is not bound to fight, if the defendant wages battle. 2 *Inst.* 320.

Nor, in a *scire facias* to execute a fine, whereby land was rendered to his ancestor in remainder, after the death of B. now dead. R. *Mo.* 16.

[If error is brought on a judgment, that the *parol* shall demur, the nonage cannot be pleaded to the writ of error, but the infant shall answer to the errors assigned. *Fortescue Aland v. Aland Mason*, M. 13 G. *Ld. Raym.* 1433. *Str.* 861.]

(D 3.) When he shall have his Age.

So, generally, in all real actions, if the tenant be within age, and claims by descent, he shall have his age; as, in *aiel*, *formedon*, &c. 6 *Co.* 4. b.

If it be prayed in aid, by tenant for life, of the infant in reversion. 11 *H.* 6. 10. b.

So, in error to reverse a fine, tho' the plaintiff counterpleads that she claims dower only. *Per three J.* 2 *Cro.* 392. *Mo. acc.* if the infant be also terre-tenant as well as heir; otherwise, not. *Mo.* 847. 1 *Rol.* 251. 323.

So, in debt against the heir, or a *scire facias* upon a judgment, statute or recognizance. 3 *Co.* 13. a. *Co. L.* 290. a. 11 *H.* 6. 10. b. *Vide Pleader*, (2 E 3.)

And by the *ft. Mert.* 5. *non current usura* against an infant; and therefore, he shall not pay a *nomine pœna* for rent, or upon an obligation, or recognizance. 2 *Inst.* 88, 9.

But

But he shall not have his age, in an action for his own wrong; as, in a *cessavit* for his own *cesser*. 6 Co. 4. b. Co. L. 380. b.

Nor, where he claims as occupant upon a grant of an estate for life to his father and his heirs. R. 1 And. 21.

Nor, in *estrepement* for waste; for it is in the nature of trespass. 2 Inst. 328.

Nor, in a *nuper obiit*, which is to try the privy of blood. 6 Co. 4. b.

Nor, in *error*, where he is not terre-tenant. 47 Ed. 3. 8.

Nor, if prayed in aid as patron, in annuity against the parson; for no loss falls upon the patron. R. 11 H. 6. 10. b.

In partition. 6 Co. 4. b. Hob. 179.

Inattaint, or disceit. 2 Cro. 393. 47 Aff. 9. 47 Ed. 3. 8.

In dower. 2 Cro. 393.

In a *quod ei de forceat* to avoid a recovery by default against a woman entitled to dower. 2 Cro. 393.

Nor, by the *ft. W.* 1. 47. in a writ of entry *sur disseisin*, against the heir of the disseisor. 2 Inst. 257.

Nor, by the *ft. 2 W.* 40. in a *cui in vitâ*, or *sur cui in vitâ*. 2 Inst. 455.

So, by the *ft. Marl.* 52 H. 3. 6. in a writ of ward against the heir, if the heir be an infant, he shall not have his age. 2 Inst. 112.

So, if a woman recovers in dower by default, it is not error that the tenant was within age. R. Mo. 848. per two J. Gawdy cont. Cro. El. 557. 567. Mo. 342.

(D 4.) When *Laches* does not prejudice him.

So, *laches*, generally, does not prejudice an infant, in respect of a prior right or entry; as, a descent does not take away his entry. Co. L. 245. b. Vide *Discent*, (D 7.)

A fine, and non-claim, by the common law, do not bar his right. Pl. Com. 359. Vide *Fine*, (K 3, 4.)

Nor, a warranty bar his entry, if he was within age at the descent of the warranty. Co. L. 380. b.

So, where there is a condition annexed to the estate, that for non-payment the rent shall be double; if the infant does not pay, it shall not be double; for by the *ft. Mert.* 5. *non current usura contra aliquem infra atatem existentem*. Co. L. 246. b. 2 Inst. 88, 9.

So, where an infant is in ward to the king, he does not forfeit his estate by breach of a condition. Hard. 16.

But an infant shall be liable for the breach of a condition in law annexed to his estate. Co. L. 233. b. Hard. 11.

So, he shall be subject to a charge, or penalty; as, for waste, or *cesser* of rent for two years. Pl. Com. 364. b.

So, he shall be subject for a condition in fact annexed to his estate. Co. L. 246. b. R. 2 Lev. 21. Ray. 236. 1 Mod. 86. 1 Vent. 199.

So, he shall lose his goods if they are waived, strayed, or wrecked, &c. tho' an infant. Pl. Com. 364. b.

So, lapse incurs, if an infant does not present to a church within six months. Co. L. 246. a. Vide *Esglise*, (H 11.)

So, a villein, who continues in *antient demesne* for a year and a day without claim of his lord, shall be enfranchised; tho' the lord be an infant. Co. L. 246. a.

So,

So, an appeal is lost if it be not commenced within a year and a day; tho' the heir be an infant. *Co. L. 246. a.*

A lord shall not enter for *mortmain*, if he does not enter within a year, tho' an infant. *Pl. Com. 364. b.*

Nor, shall he enter upon the purchase of his villein, if he does not enter before his alienation; for he has no title till entry. *Pl. Com. 364. b.*

So, a descent from the king binds an infant. *Co. L. 246. a.*

And a descent from a common person to an heir, who is thereby remitted; for a remitter operates against an infant. *Co. L. 246. a.*

So, an infant shall be charged for a trespass done by him.

So, an infant of 17 years of age shall be charged for malicious words. *Noy, 129.*

Discontinuance by an Infant.

Vide Discontinuance, (C 6.)

Limitation of Action by an Infant.

Vide Temps, (G 16.)

Action and Suit, by, and against an Infant.

Vide Chancery, (3 R 1, 2.)—Pleader, (2 C 1, 2.—2 E 1, &c.—2 G 3.—2 W 22.—3 L 13.)

Maintenance of Infants.

Vide Chancery, (3 R 6.)

E N Q U E S T.

(A) When a Trial shall be by Inquest.

(A 1.) If it be a mere Matter of Fact.

[*I*T is of the greatest consequence to the law of England, and to the subject, that the powers of the judge and jury be kept distinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England. *Per Hardwicke C. J. Rex v. Poole, P. 7 G 2. B. R. H. 23.*]

[*The construction the law putteth upon facts found by a jury, is in all cases undoubtedly the proper province of the court. Foster, 256.*]

As to the antiquity, number, qualification, exemption, and challenge of jurors, *vide Challenge.*

What matter shall be found by a verdict, and what verdict shall be good, or not, *vide in Pleader, (S 1, &c.)*

Where the trial is to be of a matter of fact, regularly, it shall be tried by an inquest of the same county. *9 Co. 25. a. Dal. 74, 5.*

(A².)

(A 2.) Tho' it relate to a Matter triable by Certificate, Record, &c.

So, if it relates to a spiritual thing when the matter of spiritual conuſance is not directly in iſſue, it ſhall be tried by the country, and not by the certificate of the biſhop. *Vide Certificate, (A 2.)*

Or, if it relates to the circumſtances of a thing upon record, which do not appear upon the record; as, if the iſſue be, whether a tenant in a *per qua ſervitia* held of the conuſor at the day of the note of a fine. *2 Rol. 574. l. 13.*

In eſcape againſt a ſheriff, who returned, *non eſt inventus*; if the iſſue be, whether he was taken by the ſheriff. *2 Rol. 574. l. 27.*

If the iſſue be, whether an action be pending by covin; for the covin is the principal. *2 Rol. 574. l. 35.*

Whether the king preſented upon a judgment, or avoidance; tho' the king's preſentment is upon record in *Chancery*. *2 Rol. 574. l. 40.*

If the iſſue be, at what time a patent was inrolled. *2 Rol. 575. l. 17.*

Whether the king was ſealed at the time of a patent. *2 Rol. 575. l. 22.*

Whether a plaint was levied in an inferior court according to the cuſtom. *R. 2 Rol. 578. l. 15. Hut. 20.*

If the iſſue be, whether the ſtatute ſtaple was duly ſeiſed. *R. Cro. El. 233.*

(A 3.) Tho' mixed with them.

If it be mixed with matter of record, or of another nature, it ſhall be tried by the country. *1 Sid. 314.*

So, if it be, whether a church is void by ceſſion, deprivation, or reſignation, &c.; for the avoidance is temporal, and the firſt thing to be inquired of. *Dal. 74.*

(B) When not.

WHEN trial ſhall be by the certificate of the biſhop or ordinary, *vide in Certificate, (A 1, &c.)*

When, by the mouth of the recorder of *London*, *vide in Certificate (B).*

When by the certificate of the maſhal, *vide in Certificate (C).*

When, by battle, *vide in Battel, (A 1, 2.)*

When, and how by the grand aſſiſe, *vide in Battel, (A 3.)*

When, by inſpection, *vide in Trial, (B 1, &c.)*

When, by the record, *vide in Trial (A).*

When, by witneſſes, or the examination of the juſtices, *vide in Trial, (B 4, 5.)*

When, by the peers of parliaments, *vide in Dignity, (F 1, 2.)—Parliament, (L 16, &c.)*

(C) Inqueſt, how ſummoned.

(C 1.) By *Venire facias*.

(C 1.) When I N the courts of *Westminster*, after iſſue joined, a writ of *venire facias* ſhall be awarded, *quod venire facias 12 bonos & legales homines de vicineto, &c. ad faciendum jurat., &c.*

[Since

[Since the jury act, 3 G. 2. c. 15. the *venire* must be *de corpore comitatus*, in the actions excepted by the act for amendment of the law. *French v. Wiltshire*, H. 11 G. 2. Str. 1085. Andr. 99.]

[By st. 24 G. 2. c. 18. it shall be *de corpore comitatus*, in actions and informations on penal statutes.]

[Allowed on error. *Frederick v. Lookup*, H. 7 G. 3. 4 B. M. 2018.]

[By this statute, the time for trials by *nisi prius* in *Middlesex*, is enlarged to 14 days after term.]

[Award of *venire*, with the same abbreviations by &c.'s in *English* as were usual in *Latin*, is good. *Barnes*, 240.]

[In a prosecution against a justice of the peace, the court refused the common rule for a good jury, because that is often made up of gentlemen who are in the commission. *Rex v. Smith*, H. 6 G. Str. 265.]

By the common law it was returnable at *Westminster*.

And now, since the st. W. 2. 30. which gives the *nisi prius*, it shall be returnable at *Westminster*, *nisi tales* (viz. the justices of assize) *prius tali die & loco venerint*, &c.

Upon which statute the return of the *venire facias* was at *Westminster* at a day after the assizes; but because by the st. 42 Ed. 3. 11. no inquest (except in assize or gaol-delivery) shall be taken before the names of the jurors be returned in court, the *venire facias* shall be returned before the day of assize, with the panel of the jurors annexed, and upon that a *distingas* or *habens corpora* goes, returnable at a day after the assizes, *nisi* such a one *prius*, &c.

[If the *venire* is returnable subsequent to the assizes, verdict shall be set aside. *Barnes*, 460.]

And it shall be entred upon the roll, that the jury made default at the return of the *venire facias*.

[A blank for the return of the *venire* in the record is not cause to arrest judgment. *Barnes*, 486.]

If several issues between the same parties arise within the same county, the court will grant but one *venire facias*. 2 Cro. 550, 551.

And several writs of *venire facias* cannot afterwards be granted, tho' nothing be done upon the first.

So, several issues by several defendants may be tried by one *venire facias*. R. Hob. 37. 2 Rol. 667. D.

Tho' the issues arise in several places, if the *venire facias* be from all the places. R. Hob. 37. 2 Rol. 667. D. Vide post. (C 3, 4.)

But where there are several issues, there may be several writs of *venire facias*. Hob. 37.

[If either party will suggest special matter about awarding the *venire*, a copy must be given to the opposite party, and they must have reasonable time to consider it, before a *nient dedire* is entred. *Brocas v. Civ. London*, M. 6 G. Str. 235.]

(C 2.) To whom it shall be directed.] A *venire facias*, generally, shall be directed to the Sheriff.

If a jury be struck by the master of the office upon an order of the court, a list of 48 shall be delivered, and twelve put out by the attorney of each of the parties, or (if the attorney of either, upon notice be absent) by the master. 1 Sal. 405. *Rex v. Duffin*, M. 9 G. 2. B. R. H. 158.] [If,

[If, after a special jury has been struck, the cause goes off for default of jurors, no new jury can be struck, but the cause must be tried by the jury first appointed. *Rex v. Perry, B. R. M. 34 Geo. 3. 5 T. R. 453.*]

[By *st. 24 G. 2. c. 18.* the party applying for special jury shall pay not only the expences of striking, but all expences occasioned by the trial by special jury; and shall have no further allowance than for common jury, unless judge certifies that it was a cause proper to be tried by special jury.]

[After common jury return, and the cause a *remanet*, defendant cannot have special jury in *Middlesex*, tho' it has been done at the assizes. *Barnes, 449. 461.*]

[Not after *venire* returned. *Barnes, 488.*]

But if the issue arises within the palace, the *venire facias* shall be to the warden of the palace. *2 Rol. 667. E.*

If the array be quashed for favour, or default of the sheriff, it shall be awarded to the coroners.

If for favour in the under-sheriff, it may be to the sheriff, *ita quod sub-vicecomes se non intromittat.* *R. 2 Rol. 669. l. 35.*

If for partiality or default in one of the sheriffs of *London*, it shall be to the other alone. *R. 1 Sal. 152. 4 Mod. 65. Sho. 329.*

So, if one of the coroners be not indifferent, it shall be to the others, *ita quod ille se non intromittat.* *R. 2 Rol. 670. l. 20.*

If all the coroners be not indifferent, it shall be to two elisors chosen by the court.

[The method of appointing elisors, is, rule why it should not be referred to prothonotary to consider and report fit persons, rule made absolute, he nominates *A.* and *B.*, rule why they should not be appointed by the court, rule made absolute. *Barnes, 465.*]

Or, by consent of the parties, to the two justices of assize. *10 H. 4, 5.*

So, if there be cause of challenge to the sheriff, the plaintiff may make suggestion upon the roll, and if the defendant confesses it, a *venire facias* shall be immediately awarded to the coroners. *Dy. 367. 2 Rol. 668. G. H. Co. L. 157. b.*

If the defendant does not allow the cause, he cannot afterwards challenge the array for it. *9 Ed. 4. 6. Co. L. 157. b.*

If process be once awarded to the coroners, all subsequent process shall be to them. *Co. L. 158. a. R. Mo. 356.*

Tho' there be a new sheriff afterwards. *Co. L. 158. a.*

So, if process be once to elisors, all afterwards (except the *distringas*) shall be to them. *2 Rol. 670. l. 45. 47.*

But a defendant cannot make suggestion upon the roll, and have process upon it to the coroners; for he may challenge the array, and the delay shall be intended for his advantage.

So, process does not go to the coroners, where one of the sheriffs only is party or partial; for it shall be awarded to the other. *R. 4 Mod. 65.*

So, if process be awarded to the sheriff, and not taken, but entred to make a continuance, it may afterwards be awarded to the coroners. *R. 2 Cro. 36.*

(C 3.) *What form is sufficient.*] A *venire facias* is sufficient, tho' it

it be *ad triandum exitum inter A. et B.* when there are several issues, for it is *nomen collectivum*. *R. 2 Rol. 667. C.*

But by the *st. 35. H. 8. 6.* the *venire facias* to try the issue in the courts at *Westminster*, shall be in this form: *Precipe quod ven. fac. 12 liberos & legales homines de vicineto de B. quorum quilibet habeat 40s. terra tent. reddit. per ann. ad minus per quos rei veritas melius scire poterit, & qui nec, &c.*

By the *st. 27 El. 6.* *quorum quilibet habeat 4 l.*—By the *st. 4 & 5 W. & M. 24. 10 l.* (*vide 3 Geo. 2. c. 25. and 4 Geo. 2. c. 7.*) and in *Wales 6 l.*

By the *st. 4 & 5 Ann. 16.* *12 homines de corpore comitatus.*

(C 4.) *How it shall be returned.*] The form of the return is, *executio istius brevis patet in quodam pannello huic brevi annex.*, and then annex in a panel the names of the jurors. *Kit. 265. b.*

And tho' the writ says *12 probos & legales homines*, by antient usage the sheriff ought to return *24.* *Co. L. 155. a.*

By the *st. W. 3. 13 Ed. 1. 38.* sheriff summoning in assises (unless in grand assise) more than *24*, shall render damages to the party, and be amerced to the king.

So, by the common law, the sheriff ought to give the proper Christian name, surname, and addition of each juror.

By the *st. of York, 12 Ed. 2. 5.* he ought to put his name to every return.

By the *st. 27 El. 7.* he shall not make return of any juror without the addition of place of abode, or other addition by which he may be known.

There ought to be *15* days between the *teste* and the return. *2 Inst. 567. Vide Process (B).*

But now, by the *st. 18 El. 14.* it shall be aided after verdict, if the return be insufficient or imperfect; and by the *st. 21 J. 13.* if there be no return, when the panel of the names of the jurors is annexed to the writ; or if the name of the sheriff is not put to the return, when the writ is returned by the proper officer. *Vide Amendment, (C 1, 2.)*

And the court will not direct the return of the *venire facias* to be filed, unless the plaintiff pleases. *3 Mod. 245.*

From what place a jury or inquest shall come, *vide in Amendment, (H 1, 2.)*

[It need not appear that the jury have been summoned; for since *st. 3 G. 2. c. 25.* there can be but one general return. *Phillips v. Phillips, T. 11 & 12 G. 2. Andr. 248.*]

(C 5.) By Habeas Corpora.

If the jury make default at the return of the *venire facias* in *C. B.* an *habeas corpora juratorum* shall be awarded.

[It need not appear in the return that the jury were attached by pledges; for since *st. 3 Geo. 2. c. 25.* there can be but one general return. *Phillips v. Phillips, T. 11 & 12 G. 2. Andr. 248.*]

[If the *venire* is returned with *24*, and the *bab. cor.* with *48*, the verdict shall be set aside. *Barnes, 485.*]

(C 6.)

(C 6.) By *Distringas Juratores*.

If the jury make default at the return of the *venire facias* in *B. R.* a *distringas juratores* shall be awarded.

So, in *C. B.* if the jury do not appear at the return of the *habeas corpora*.

A *distringas* is awarded by the court, at the return of the *venire facias*, and ought to be teste'd the same day; otherwise it is without warrant, and makes a discontinuance. *Mod. Ca.* 269.

And the want of a good *teste* cannot be amended. *R. Mod. Ca.* 269. 287.

[Warrant for a *tales* at a trial in a county palatine on issue joined at *Westminster*, is by the king's attorney-general. *R. v. Lamb*, *H. 8 G. 3. 4 B. M.* 2171.]

(D) How sworn.

AFTER a full inquest appears, they shall be sworn *ad veritatem dicend.* And if it be entred, *quod electi triati & jurati super sacramenta sua dicunt*, &c. omitting, *ad veritatem de premissis dicend.*; it will be a material defect, which cannot be amended. *R. 2 Cro.* 119.

So, if it be said *quod tales*, &c. *ad veritatem*, &c. *jurati*, without saying, *cum aliis jurati*, &c. *R. 2 Cro.* 207.

(E) When an Inquest shall be taken by Default.

IN personal actions, where the plea is not a confession of the action, as in debt, &c. if a full inquest appears, but the defendant does not appear; the inquest shall be taken by default. *1 Rol.* 586. l. 31.

So, in ejectment.

And he may then confess lease, entry, and ouster, and pray the nonsuit of the plaintiff.

So, in an assise. *1 Rol.* 586. l. 15. *1 Sal.* 83.

So, in a real action; if the issue be not upon the realty, but in point of damages only. *1 Rol.* 586. l. 5.

Or, if upon a default before issue, process issues.

So, in trespass, tho' he pleads a release, which is denied; for the damages are uncertain. *1 Sal.* 216.

In debt, if the defendant pleads *non est factum*; for that denies the cause of action. *1 Sal.* 216.

So, if a full inquest does not appear, it may be taken by default; for the parties are demandable before the inquest. *Dub. Dy.* 265. a.

But in a real action, where the issue is upon the realty, and the tenant at *nisi prius* makes default, the *postea* shall be marked, and a *petit cape* shall issue; and if the tenant cannot save his default, and the demandant does not waive it, final judgment shall be against him.

1 Rol. 585. l. 35. *Mod. Ca.* 4.

So, in a writ of *mesne*, customs and services, &c. if the seigniorie be denied. *1 Rol.* 584. l. 37. 40.

In an appeal of rape, *capias*, *alias*, *pluries*, and *exigent* shall issue. *1 Sal.* 217.

So, in a personal action, where the plea amounts to a confession of the

the action, if the plaintiff does not waive it, judgment shall be upon the default, and no inquest taken; as, if the defendant pleads a release to a debt or demand certain, and the deed is denied. 11 H. 4. 32. *Bro. Defalt.* 4. 9. 20. 1 *Rol.* 586. l. 37. 1 *Sal.* 216.

So, in *detinue*, if the garnishee makes default. 1 *Rol.* 586. l. 47.

In a *quid juris clamat*, if the defendant claims the fee. 1 *Rol.* 587. l. 2.

In a *quare impedit*, the inquest shall not be taken by default, but a writ awarded to the bishop. 1 *Rol.* 587. l. 10.

(F) How the Inquest shall behave themselves.

AFTER the evidence given, the jury ought to continue together till they agree of their verdict, without eating, drinking, fire, candle, or speaking with any one, except the bailiff, to know if they be agreed. *Co. L.* 227. b. 15 H. 7. 1, 2. *Vide Pleader.*

[By *st.* 24 G. 2. c. 18. a juryman shall be paid no more than the judge thinks reasonable, not exceeding a guinea.]

But if the jury separate on account of a great tempest, they shall not be amerced. *Pl. Com.* 13. b. 15 H. 7. 1. b. 14 H. 7. 30.

For more concerning inquest, *vide Copyhold*, (R 11.)—*Courts*, (P 12.)—*Leet* (F).

INTERPLEADER.

Vide Chancery, (3 T).

ENTRY.

Vide Abatement, (H 48.)—*Enfant*, (C 5.)—*Estates*, (G 14.)—*Execution*, (A 1.)—*Forcible Entry*.—*Pleader*, (2 S 20.)—(2 W 50.)—*Rent*, (D 3.)

Entry for a Condition broken.

Vide Condition, (O 3, &c.)

Entry to avoid a Fine.

Vide Claim, (B 1, &c.)

Entry for a Forfeiture.

Vide Forfeiture, (A 6, 7, 8.)

Entry tolled.

Vide Descent, (D 1, &c.)

Writs of Entry.

Vide Dum fuit infra Aetatem, per *Totum*.—*Pleader*, (A 3. 1, &c.)

EQUITY.

Vide Chancery, per *Totum*.—*Courts*, (D 7.—O 5.)—*Dismiss*, (M 13, &c.)—*Parliament*, (R 13, &c.)

E R R O R.

(A) What Things may be assigned for Error.

IN what court, by whom, against whom, and in what manner, error shall be brought, *vide* in *Pleader*, (3 B 1, &c.)

When it shall be a *superfedeas*, and how the record shall be removed, *vide* in *Pleader*, (3 B 12, 13.)

Errors, how assigned, and the proceedings thereupon, *vide* in *Pleader*, (3 B 14, &c.)

What pleas to error good, *vide* in *Pleader*, (3 B 18, 19.)

How to proceed upon errors in parliament, *vide* in *Parliament*, (L 1, &c.)

[A *qui tam* action of debt is a civil suit. *Cowp.* 382.]

[And a writ of error on it lies from the King's Bench to the Exchequer-chamber. *Doug.* 353.]

A writ of error is grantable in all civil actions *ex debito iustitie*. *R. Sal.* 504.

But in criminal cases it shall be *ex gratia*, where a statute does not provide for it; and therefore, if the attorney-general does not allow it, *Chancery* will not direct it to be made out. *R. Eq. Ca. Abr.* 414.

And all errors in process against parties or jurors, or award of process, or in the record, verdict, judgment, or execution, may be thereby redressed.

[If there is one defendant, and the verbs are in the plural; as, *aperunt, abduxerunt*, &c. *Porree v. Daniel*, P. 11 G. 2 *Ld. Raym.* 1383.]

[That the judgment was given by a judge interested in the cause. *Mercers of Chester v. Bowker*, M. 12 G. *Str.* 639.]

[If there is *scire facias* against two executors, and one pleads *ne unques executor*, and the other payment by testator, and there is a verdict against the last, and nothing on the other, and then award of execution, it is error. *Street v. Hopkinson*, M. 10 G. 2. *Str.* 1055, B. R. H. 345.]

[If the swearing of the jurors is not well alleged; as, if the words to *speak* are omitted. *Toe v. Adlam*, P. 11 G. 2. *Andr.* 160.]

[If defendant pleads that plaintiff became bankrupt, &c. and concludes with a general averment, it is error; for he should have concluded to the country. *Anderson v. Winter*, P. 11 G. 2. *Andr.* 176.]

[That it is not said that defendants appeared by attorney, nor in their proper persons, is not error. *Dyke v. Blackston*, M. 13. G. *Ld. Raym.* 1449.]

[Nor, that a writ of inquiry was executed on the day of the return. *Ibid.*]

[It is no error, tho' there is no cause of action mentioned in the memorandum; for it sets out the bill. *Goofetree v. Reynolds*, M. 11 G. 2. *And.* 23.]

[Nor, that the award to the sheriff is general, without saying of what county. *Ibid.*]

[An original writ of the same term in which final judgment is given, will not warrant that judgment, if it appear upon the same record,

record, that there have been proceedings of a preceding term.
1 *Wils.* 181.]

(B) Error upon an Indictment; how it shall be brought.

IF error be upon an indictment at the assises or quarter-sessions, the usual course is to remove the indictment by *certiorari* into the crown-office, and afterwards to sue a writ of error *coram nobis*. *Mod. Ca.* 178.

Or, it may be removed directly by writ of error; for both ways are good. *Mod. Ca.* 178.

If error be brought upon an indictment, and the indictment removed, a rule may be given in the crown-office, that the indicttee assign his errors.

If he does not, there shall be a peremptory rule upon motion; and if then he does not, he shall be nonsuited, and execution awarded. *Mod. Ca.* 178.

(C) The Judgment in Error.

WHAT shall be done by the court if the judgment be affirmed or reversed, *vide* in *Pleader*, (3 B 20.)

When there shall be restitution, *vide* in *Pleader*, (3 B 20.)

If judgment be in *C. B.* that a plea in abatement is good, and that the writ shall abate, and that judgment be reversed in *B. R.*, the court of *B. R.* shall proceed upon the same writ.

So, in error upon a judgment in *Wales* that a *quod ei deforceat* does not lie, if judgment be reversed, *B. R.* shall proceed upon the same declaration. *Jon.* 381.

(D) When Error shall be avoided by Entry or Plea, without a Writ of Error.

WHEN a man shall avoid an outlawry by plea, or error, *vide* in *Utlagary*, (C 2, &c.) *Vide Pleader*, (2 W 39.)

If a judgment be void, it may be avoided by plea, without a writ of error.

So, if the party cannot have error, he may avoid it by plea; as, where he is a stranger to the judgment; as, if an administrator pleads a judgment against him at the suit of *B.*, and no assets *ultra*, &c. the plaintiff by replication may shew, that the judgment was null, and how. *R. 2 Mod.* 308.

But if a judgment is only voidable, the party shall not avoid it without writ of error; as, if in a *cui in vita* the tenant dies, and afterwards judgment is against him, which is erroneous, and execution is sued against the heir; he shall not avoid the judgment in assise, without error. 1 *Rol.* 742. l. 12.

So, in a *scire facias* by an executor, upon a judgment in ejectment by his testator against *B.*, execution shall not be avoided, nor judgment stayed, by saying that the tenant died *pendente lite*; for he ought to avoid it by error. 1 *Rol.* 742. l. 18.

So, error in the principal judgment, is no plea in a *scire facias* against the heir, or bail. 1 *Rol.* 742. l. 26. 30. *Vide Bail*, (R 3, &c.)

Not,

Nor, in debt upon an erroneous judgment. 1 *Rol.* 742. l. 35.
So, if a fine or recovery is had against an infant, it cannot be avoided by entry, without error. 1 *Rol.* 742. l. 50. *Vide Infant*, (C 5.)—
Fine, (H 3, &c.)

Costs in Error.

Vide Costs (B).

Error in the Exchequer-Chamber.

Vide Courts, (D 6.)

Error to avoid a Fine.

Vide Fine, (H 3, &c.)

Error from Ireland..

Vide Ireland (G).

Writ of Error not amendable.

Vide Amendment, (2 C 4.)

ESCAPE.

(A) Escape in Criminal Cases.

(A 1.) Voluntary.

BY the *st.* 5 *Ed.* 3. 8. indictees and appellees of felony shall be safely kept.

And therefore, if a gaoler permits a voluntary escape, it shall be felony. 2 *Inst.* 52. *H. P. C.* 114.

If the prisoner was committed for high treason, it shall be treason. 2 *Inst.* 52. *H.* 114.

So, a voluntary escape by a gaoler shall be treason or felony, tho' he was only a gaoler, *de facto*, and not *de jure*. 2 *Inst.* 592. *H.* 114.

So, by any stranger of one in his custody. *H. P. C.* 112.

But it will not be felony, if the prisoner be permitted to escape, when no felony was committed. *Bro. Escape*, 8. 2 *Inst.* 592.

Or, if he was not committed for felony; as, if *A.* receives a felon, knowing of the felony, and afterwards permits his escape. *Sta.* 32, 3.

Or, if it was not a felony at the time of the escape; as, if *A.* gives a mortal wound to *B.* upon which he is arrested and voluntarily permitted to escape, and afterwards *B.* dies; it is not felony. *Sta.* 33. *a.*

So, if the prisoner was not lawfully committed to his custody; as, if there was not a lawful warrant. 2 *Inst.* 592.

And therefore, a gaoler shall not be tried for an escape, till the prisoner be attainted upon indictment or appeal. *Semb. cont.* 2 *Inst.* 52. *Acc.* 2 *Inst.* 592. *H.* 110. 115. *Cont. Dy.* 99. *a.* that it shall be felony, tho' the prisoner be not indicted.

So, a voluntary escape of one committed for petit larceny, or for a death *per infortunium*, or *se defendendo*, is not felony. *Crompt. 39. a.*

(A 2.) Negligent.

So, by the *st. Wint. 13 Ed. 1. 4.* if murder or homicide be done in a walled town, &c. and the offender escapes, the town shall be amerced. *7 Co. 7. a.*

So, *London was. Cro. Car. 252.*

By the *st. 5 Ed. 3. 1.* a marshal who permits the escape of indicted or appellees in his custody, by bail or without bail, shall be imprisoned for half a year, and ransomed at the will of the king.

So, if any gaoler permits the escape of any in his custody, thro' neglect, he shall be fined. *H. P. C. 113. Sal. 272.*

Tho' it be a stranger, who has another in his custody; tho' he is not a gaoler *de jure.* *H. P. C. 112.*

So, the prisoner himself may be indicted for an escape, tho' it be with the consent of the gaoler. *R. Cro. Car. 210.*

If a gaoler bails a person not bailable, it shall be a negligent escape. *H. P. C. 113.*

An indictment for an escape is good until a pardon or discharge be shewn; for it shall not be intended. *Sal. 272.*

So, it will be good for an escape of one in his custody, tho' it does not appear how he came into his custody. *R. 2 Rol. 146. Semb. cont. Sal. 272.*

The usual fine for an escape of a person attainted is 100 *l.* *H. P. C. 113.*

Of a person indicted, before conviction, is 5 *l.* *H. 113.*

Of a prisoner not indicted, at the discretion of the court. *H. 113.*

By the *st. 19 H. 7. 10.* a fine for a negligent escape of any indicted for high treason shall be 100 marks at least; if committed for suspicion of high treason, 40 *l.*; if indicted for murder or petit treason, 20 *l.*; if for suspicion of these, or indicted for other felony, 10 *l.*; if not indicted, 5 *l.*

By the *st. 31 Ed. 3. 4.* the escape of thieves, felons, &c. shall be judged by any of the king's justices.

By the *st. 1 R. 3. 3.* justices of peace may inquire of escapes of felons, in their sessions.

So, the leet may inquire; tho' it cannot punish the escape. *2 Inst. 165. Vide Leet, (L 2.)*

If the gaoler be not sufficient, the sheriff shall answer for his neglect. *H. 113.*

But by the *st. W. 1. 3 Ed. 1. 3.* nothing shall be demanded by the sheriff, or other, for the escape of a thief or felon, till it be adjudged by the justices errant.

And this seems to be the common law. *2 Inst. 651.*

But *B. R.* is not within this statute. *2 Inst. 166.*

So, a gaoler shall not answer for a negligent escape of one not lawfully in his custody.

And therefore, the indictment ought to shew a lawful commitment to his custody. *Semb. 5 Mod. 415.*

So, a gaoler shall be excused for a negligent escape, if he retakes upon fresh pursuit. *H. P. C. 114. Dub. 6 H. 7. 11. 10 H. 7. 25. 28.*

So,

So, the sheriff shall not answer criminally for a negligent escape of the gaoler. *Salk.* 272.

(B) Escape in Civil Cases.

(B 1.) What Remedy for it

BY the common law, the sheriff, and every gaoler, ought to keep persons in execution *in salva custodia*. 3 *Co.* 44.

And if such prisoner escapes, an action upon the case lies against him. 2 *Inst.* 382. *R.* 1 *Rol.* 99. l. 10. 15. 2 *Cro.* 289. 2 *Lev.* 159.

[So, an action on the case lies against the warden of the Fleet for an escape on mesne process, and the plaintiff shall recover damages. 2 *Wils.* 294.]

So, by the *st. W.* 2. 13 *Ed.* 1. 11. *si vicecomes, &c. per repleg. &c. permittat* (an accountant) *sine assensu domini ire ad largum, respondeat de damnis, & si non habet, &c. respondeat superior.* *F. N. B.* 130. *B.*

So, by the *st. de Merc.* 13 *Ed.* 1. the gaoler shall receive the consur, and answer for his body, or the debt, and if he has not, the superior.

So, by the *st.* 1 *R.* 2. 12. if the warden of the Fleet permits a prisoner to go at large without the king's writ, or agreement of the party, debt lies against him.—Debt or action upon the case. *R. Cro. El.* 767.

[Debt lies by 1 *R.* 2. c. 12. as well for a negligent as for a voluntary escape. *Stonehouse v. Mullins*, *T.* 4 *G.* 2. *Str.* 873. 2 *H. Bl.* 108.]

And by the equity of these statutes debt lies in all cases, for an escape, against a gaoler. 2 *Inst.* 382. *R. Pl. Com.* 36. b. *Adm.* 2 *Lev.* 159. 15 *Ed.* 4. 20.

[Provided the party be in custody in execution. *Vide infra.*]

And may be sued by writ or by bill of debt. 2 *Inst.* 382. *Dub. Pl. Com.* 38. a. 42 *Ed.* 3. 13. a.

It may be against the mayor of the staple for an escape of one in his custody in execution. 9 *H.* 6. 19.

Debt lies for an escape against a gaoler within the *Cinque Ports*. 30 *H.* 6. 6.

So, for an escape in a court of *Pypowders*. 2 *Inst.* 382.

[In escape on mesne process in an inferior court, defendant shall not take advantage of any error below, if he might justify the arrest under the process. *Bull v. Steward*, *M.* 23 *G.* 2. 1 *Wils.* 255.]

So, for the escape of one committed by commissioners of bankrupts. *R. Mo.* 834. *Vide post.* (C).

So, if two are in execution, and one of them escapes. 1 *Rol.* 205.

If husband and wife are in execution upon a judgment against both, and the wife escapes. *Dub.* 1 *Rol.* 204.

By the *st.* 8 & 9 *W.* 3. 27. if the keeper of a prison take money or security to permit or assist an escape, he forfeits 500*l.* and his office, and shall be ever incapable of a like office.

If judgment be against the marshal of *B. R.* or warden of the Fleet for an escape, or his deputy, on oath by the party that the judgment was without fraud and for a real debt, the court on motion shall sequester the profits of the office for satisfaction.

And execution or sequestration shall not be stayed by writ of error, unless special bail be given.

And the inheritance of the Marshalsea, or Fleet, shall answer for escapes or misdemeanors by themselves or deputies, and shall be extended for that purpose.

So, by the *st. 1 Ann. st. 2. c. 6.* the sheriff shall be liable for an escape of any committed to him on an escape-warrant.

So, an action lies against a gaoler for an escape of one committed upon process of the Admiralty. *R. Sav. 11. 15.*

Or, upon a *capias utlagatum*; and the plaintiff shall recover the whole debt in damages. *R. Mo. 641. R. 5 Mo. 200.*

[Case (but not debt) lies for the escape of an outlaw on *mesne* process. *Cooke v. Champneys, P. 4 G. 2. Str. 901.*]

[Which action is founded on the damage sustained; and if no damage is sustained, the creditor has no cause of action. *Planck v. Anderson, B. R. M. 33 Geo. 3. 5 T. R. 37.*]

[The difference between being in custody in execution, and on *mesne* process. *Ibid.*]

[In the former case debt lies, and the creditor may recover the whole debt, in the latter instance an action on the case must be brought, and the damages will be proportioned to the delay or prejudice the creditor may have experienced in recovering his debt. By *Buller J. ibid.*]

An action lies for an escape, tho' the gaoler be infant, or *feme-covert*. *2 Inst. 382.*

[An administratrix may maintain an action in her own name against the marshal for the escape of a prisoner in execution on a judgment obtained by her as administratrix. *2 T. R. 126.*]

[Under a count for a *voluntary* escape, the plaintiff may give evidence of a negligent escape; and the defendant may plead a retaking on a fresh pursuit to such a count, without traversing the voluntary escape. *Id. ibid.*]

[In debt for an escape against the sheriff, the indorsement of *non est inventus* on the *ca. sa.* is sufficient evidence of its having been delivered to him. *Cowp. 63.*]

[A legal arrest must be proved in such action. *Id. ibid.*]

[The bailiff's name indorsed on the writ is sufficient evidence that he was *authorised* by the sheriff to arrest, without proof of the warrant. *Id. 66.*]

[In debt against the sheriff or gaoler for an escape, the jury cannot give a less sum than a creditor would have recovered against the prisoner. *viz.* the sum indorsed on the writ, and the legal fees of execution. *2 Term Rep. 126.*]

[If a mob riotously and by force demolish a gaol, by which the debtors escape, the creditors may support an action against the sheriff or gaoler. *Elliott v. Duke of Norfolk, B. R. Trin. 32 Geo. 3. 4 T. R. 789.*]

[In such an action the defendant can avail himself of nothing as an excuse but the act of God, or the king's enemies. *Alsept v Eyles, C. P. Trin. 32 Geo. 3. 2 H. Bl. 108.*]

(B 2.) Against whom.

The action for an escape shall be brought against him who has the custody of the gaol. *Vide post. (B 3.)*

Tho'

Tho' he has it *de facto* only, and not *de jure*. 2 *Inst.* 381, 2.

As, it shall be against the sheriff, not against his deputy; as, the officer who takes care of the prison in the county. 2 *Inst.* 382. *R. Rol.* 94. l. 30. *Semb. Hard.* 32.

Or, the serjeant, who makes the arrest. *R. 1 Rol.* 806. l. 45.

The keeper of *Newgate*. 2 *Jon.* 62.

The marshal of the *Marshalsea* in *B. R.* 9 *Co.* 98.

If he who has the custody of a gaol in fee, substitutes another for life, or at will, the action shall be against him; for he has the actual possession of the office. 9 *Co.* 98. a.

So, if an escape be out of the custody of mayor or bailiffs of a city, town, &c. which has a gaol; the action shall be against them, and not against the sheriff. 1 *Rol.* 99. l. 15.

So, it shall be against a bailiff of a franchise, if the escape be by him. 1 *Rol.* 99. l. 45.

And against the serjeant who made the arrest, if the escape be after an arrest by him upon process from the comptroller before commitment to the comptroller. *R. 1 Rol.* 806. l. 30.

So, it shall be against both the sheriffs of *London*, if the escape be after an arrest upon a plaint in the comptroller, of one of them. *Dub. Sho.* 162. *Carth.* 145.

Or, against the surviving sheriff of *London*, where one dies. *R. Cro. El.* 625.

So, against all the coroners, where the arrest was only by one. *Dub. Com.* 435, 6. *Mod. Ca.* 37.

So, it lies against the old sheriff, if he omits to deliver any prisoner by indenture to the new. *R. 2 Leo.* 54. *Vide County*, (B 3.)

But an action for an escape shall not be against the superior, if the inferior be sufficient. 2 *Inst.* 382.

Vide post. (B 3.)

(B 3.) *When against the superior.*] But in all cases where the inferior is insufficient, debt lies against the superior for the escape. *Semb.* 2 *Jon.* 60. 1 *Vent.* 314. 2 *Lev.* 158. 9 *Co.* 98. a. *Vide ante*, (B 2.)

If he be insufficient at the time of the action brought, tho' he was sufficient at the time of the commitment or escape; for that is the time most regarded. 2 *Jon.* 61. 2 *Lev.* 160.

And therefore, a verdict is not sufficient, if it does not find the insufficiency when the action was brought, tho' it finds him insufficient when he was keeper, or at the time of the commitment, or escape. *R. 2 Jon.* 61. 1 *Vent.* 314. 2 *Lev.* 160.

So, it lies against the superior, tho' the inferior was admitted by the court. *Adm.* 2 *Jon.* 61.

Tho' the superior had no notice of the insufficiency. *Adm.* 2 *Jon.* 61.

The superior against whom the action ought to be brought, is he who, by his estate in office, or by his authority without estate, has the power of putting in the inferior officer. 2 *Jon.* 61.

As, the duke of *N.* being marshal of *B. R.* in fee, makes a deputy; he himself is the superior, and the deputy the inferior officer. 2 *Inst.* 382. 9 *Co.* 98. b.

The sheriffs of *London* are the inferior, the mayor and commonalty, who have the office of sheriff in fee, are the superior. 2 *Inst.* 382.

If a man, who has the custody of a gaol in fee, grants it for three lives, he is the superior, and the grantee the inferior. 2 *Inst.* 382. *Semb.* 2 *Jon.* 61. 2 *Lev.* 159. *Adm.* 9 *Co.* 98. 1 *Vent.* 314.

So, the dean and chapter of *Westminster* are the superior, the bailiff of a franchise, put in by them, the inferior. *Adm.* 2 *Lev.* 159.

The lord of a franchise, who has a gaol, is the superior, and shall answer for his gaoler. *Sav.* 11. 15.

But there cannot be two superiors within the statute. 2 *Inst.* 382.

So, debt does not lie against the superior, upon a general declaration for an escape; but he ought to be specially charged for the insufficiency of the inferior. *R.* 2 *Lev.* 160.

So, if a man has the custody of a gaol in fee in reversion, after a grant thereof for life, rendering rent, which was not made by him, the reversioner is not superior. *Adm.* 2 *Jon.* 61.; for the superior is not such in respect of the rent, or the reversion, but in regard that the inferior officer derives his estate from him.

(C) What shall be an Escape.

[AN escape from the rules of the King's Bench prison without the marshal's knowledge, is not a voluntary escape. 2 *Term Rep.* 126.]

[If the bailiff of a liberty, who has the return and execution of writs, remove a prisoner taken in execution to the county gaol, situated out of the liberty, and there delivered him into the custody of the sheriff, this is an escape for which an action of debt lies. 2 *Term Rep.* 5.]

An action lies for an escape, if he permits his prisoner to go at large; tho' he afterwards returns. *D.* 3 *Co.* 44. a. 1 *Rol.* 806. l. 13.

[Tho' he returns the same day, and afterwards plaintiff proceeds to final judgment. *Ravenscroft v. Eyles*, *H.* 6 *G.* 3. 2 *Will.* 294.]

[If the defendant being taken in execution be afterwards seen at large for any the shortest time, even before the return of the writ. 2 *Bl. Rep.* 1048.]

[If a sheriff's officer having taken a prisoner in execution, permit him to go about with a follower of his, before he takes him to prison, it is an escape. *Benton v. Sutton*, *C. P. E.* 37 *Geo.* 3. 1 *Bos. & Pull. Rep.* 24.]

[*Quere*, Would it not have been an escape if the officer himself had accompanied him? *Ibid.*]

Tho' he does not go out of the same county. 1 *Rol.* 806. l. 15.

Or, out of the town where the gaol is. 1 *Rol.* 806. l. 24. *Hob.* 202.

Tho' he has a keeper with him. *D.* 3 *Co.* 44. a. 1 *Rol.* 806. l. 17. 20. *R. Pl. Com.* 37. *Hob.* 202.

Or, goes with the king's licence. 1 *Rol.* 808. l. 19.

Or, by command of the lord treasurer or chancellor, to collect the king's debt, being in prison for the king, as well as for the party; for this does not excuse the escape, as to the party. 1 *Rol.* 808. l. 15. *R. Dy.* 162. b. 297. a.

So, by the *st.* 8 & 9 *W.* 3. 27. if a keeper permits a prisoner on *mesne* process or execution to go out of the rules of the prison, unless by virtue of a *habeas corpus*, or rule of court on motion or petition in open court.

So,

So, if by a *habeas corpus* in *Trinity* term returnable *tres Mich.* a prisoner goes into the country with a keeper, for the greatest part of the vacation. *R. 1 Rol. 808. l. 25. 35. Hob. 202. Cro. Car. 14.*

Or, upon any *habeas corpus* be permitted to go at large in the country. *Semb. Cro. Car. 14. 3 Co. 44. a. Mo. 257. 299. Per Hale, 1 Mod. 116. Hard. 476.*

Or, if upon a *habeas corpus ad testificand.*, he goes before and stays a long time after the assises. *Semb. 1 Mod. 116.*

[*Habeas corpus ad testific.* is not a defence against action for escape of prisoners in execution; therefore the court will refuse to grant such, without consent of defendants and warden. Yet such have been granted without affidavit. *Barnes, 222.*]

[If after judgment, and before any charge in execution, a prisoner is rescued when brought out on a *habeas corpus*; it is not a good excuse for the sheriff, in an action of escape, and he shall answer it to the plaintiff. *Crompton v. Ward, P. 7 G. Str. 429.*]

[If a prisoner is removed by *habeas corpus* from *B. R.* to *C. B.* and escapes, plaintiff in an action of escape need not set out the process in *C. B.* against the prisoner. *Gambier v. Wright, T. 6 G. 2. Str. 951.*]

Or, if upon a day-rule, &c. he goes to *Kensington*, the playhouse, &c. *Cont. per Pemberton, 2 Sho. 298. Acc. per Raymond and Withens, 2 Sho. 299.*

[If a prisoner goes out early in the morning, and did not sign the petition till taken up, tho' he afterwards has a day-rule. *Anon. H. 8 G. Str. 503.*]

[The court will not grant a day-rule for a prisoner to go ten miles with a tipstaff, to treat with his creditors. *Barnes, 386.*]

If he goes into the country by order of the court, *ad colligend. bona pro solutione debiti.* *R. Bend. pl. 267.*

If brought before a baron, or other judge, by his command, after term. *Dy. 296. b. in marg.*

So, by the *st. 8 & 9 W. 3. 27.* if a keeper after a day's notice in writing refuses to shew a prisoner in execution, to him at whose suit he is so, or his attorney.

By the *st. 5 G. 24.* if he permits a bankrupt to escape, he shall forfeit 500 *l.*; if he refuses to shew him to a creditor on request, 100 *l.*; if convicted again for like offence, 200 *l.* (This act is expired; but *5 Geo. 2. 30.* is the same, except the double penalty for second offence.)

So, if a woman, keeper of a gaol, marries her prisoner, it will be an escape; for a man cannot be in the custody of his wife. *Pl. Com. 37. a.*

[If the gaoler makes a prisoner in execution turnkey, and he goes out on an errand, and returns, it is a voluntary escape. *Wilkinson v. Salter, T. 9 G. 2. B. R. H. 310.*]

Or, if a keeper in fee dies, and his office descends to the prisoner. *Pl. Com. 37. a.*

The action lies for an escape; tho' the prisoner was arrested upon a *latitat.* *1 Rol. 537. l. 50.*

Or, committed by commissioners of bankrupts for not answering to interrogatories. *R. Mo. 834. 1 Rol. 47.*

Or, in custody of the sheriff upon an attainder for felony, when process at the suit of the party was delivered, upon which the sheriff returned

returned *cepi corpus*, and then the prisoner is pardoned, and departs. *R. 1 Leo. 276.*

If committed upon a *capias pro fine*, where a *capias ad satisfaciendum* lies in the same suit; for then he shall be in execution for the party, without prayer. *R. 1 Rol. 810. l. 20. 5 Co. 88. 13 H. 7. 2. Bridg. 7.*

Or, upon a *capias utlagatum*. *R. 1 Rol. 810. l. 35. Crq. El. 706. 5 Co. 88. R. Cro. El. 652. R. 5 Mod. 200.*

Tho' the outlawry was upon the same process. *R. F. g. 265.*

Or, upon a *capias pro fine* after prayer, tho' no *capias ad satisfaciendum* lies. *1 Rol. 810. l. 30. 5 Co. 88.*

Or, upon a *capias utlagatum*, &c. where a *capias ad satisfaciendum* lies; tho' taken after the year after judgment, and no prayer be entred. *R. 1 Sal. 319. R. 5 Co. 89. b.*

So, escape lies, tho' taken upon an escape-warrant; by the *st. 1 Ann. 6.*

[If the recaption is after the action brought, it is still an escape. *R. in Demurrer, Stonehouse v. Mullins, T. 4 G. 2. Str. 873.*]

So, an action lies for an escape, where the prisoner was arrested by process out of an inferior court.

Tho' it be pleaded that the cause of action arose out of the jurisdiction, and that the officer had notice of it before the return of the writ; for the officer cannot examine that matter. *R. 7 Ann. inter Higginson and Sheaf, (Com. 153.) Vide Courts, (P 15.)*

Tho' the judgment was erroneous, or for one who sued without colour. *R. 3 Mod. 324. Carth. 148. Adm. 5 Mod. 413. R. 8 Co. 142. 2 Bul. 63. R. Cro. El. 164. 576. Yel. 42. cont.*

So, an action lies for an escape, tho' he was convicted for felony, before judgment and execution against him, and continued in prison for the felony; for until he be executed for the felony, he is chargeable to the party. *R. Sav. 63. 1 Leo. 276. 2 Lev. 84.*

(D) What not.

BUT it will not be an escape, if the party never was in his custody; as, if the old sheriff does not deliver him over upon such execution. *R. 3 Co. 72. Adm. 2 Cro. 588. Poph. 85. 2 Leo. 54.*

If he be arrested, but not actually committed to gaol, the gaoler shall not be charged for an escape. *R. 1 Rol. 806. l. 30.*

So, if a *committitur* be entred upon the roll, but the party is not taken. *1 Sid. 220.*

So, if a man bailed renders himself in discharge of his bail, and a *reddidit, se* is entred in the judge's book, and a *committitur* entred with the proper officer; yet if a *committitur* be not entred with the marshal of *B. R.*, or a rule served upon him, he shall not be charged for an escape, tho' the bail be discharged. *R. 1 Sal. 272, 3.*

So, if the entry be that *virtute* of an *habeas corpus* to a judge of *B. R. debito modo commissus fuit mar.*; for that cannot be by virtue of the *habeas corpus*. *R. 2 Sho. 17, 8.*

[It must appear that the commitment is of record; therefore, if it is laid that the prisoner was committed to the custody of the marshal, at the suit of plaintiff, by *A.* one of the justices of our lord the king, it is ill. *Wightman v. Mullins, P. 18 G. 2. Str. 1226.*]

If he be at the house of the gaoler, but not within the prison. *R. Cro. Car. 210.*

So,

So, it will not be an escape, where the prisoner was not in custody at the suit of the plaintiff; as, if he was taken by a *capias utlagatum*, or a *capias pro fine*; where a *capias* does not lie in such suit. 1 *Rol.* 810. l. 30.

Or, when he was not charged at the prayer of the plaintiff. 1 *Rol.* 810. l. 30. *R.* 1 *Leo.* 263. *Vide ante* (C).

Or, was arrested and suffered to go at large before the writ of execution delivered to the sheriff. 1 *Rol.* 809. l. 30.

Or, upon a *capias*, where no *capias* was awarded by the court, 1 *Rol.* 809. l. 35.

Or, upon a *capias ad respondendum*, which was teste'd in Trinity term, and returnable in Hilary term; for, not being returnable in the next term, it is out of court. *R.* 1 *Sal.* 273.

So, it will not be an escape, if he goes out of prison, by reason of a sudden fire in the gaol. 1 *Rol.* 808. l. 7.

Or, the gaol be broke by the king's enemies. *Bro. Escape*, 10. 1 *Rol.* 808. l. 5.

Or, the defendant be rescued upon *mesne* process, before he was in gaol. *Mar.* 1. 1 *Rol.* 807. l. 35. *R.* 2 *Cro.* 419. 2 *Lev.* 144. 1 *Rol.* 389. 440.

Tho' the *rescous* be not returned. *R.* 2 *Lev.* 144.

Or, if it be. *R.* 1 *Rol.* 140.

So, if the defendant be retaken upon fresh suit before the action commenced for the escape. *R.* 1 *Rol.* 808. l. 50. *R.* 3 *Cro.* 52. *R.* 13 *H.* 7. 2. *Godb.* 434. *Gal.* 180. *F. N. B.* 130. *B.* [Com. 422.]

Tho' the fresh suit was not begun till a day and a night after the escape. *R.* 1 *Rol.* 809. l. 10. 2 *Rol.* 681. l. 50. 3 *Co.* 52. *Mo.* 660. *Poph.* 41.

Tho' he did not retake him till he fled into another county. *Bro. Escape*, 4. *R.* 3 *Co.* 52.

Tho' he was out of sight. *R. Poph.* 41. 3 *Co.* 52. 14 *H.* 7. 1. a.

Tho' he did not retake him till seven years after, if it was upon fresh pursuit. 13 *Ed.* 4. 9. a. *Semb. Godb.* 177.

[So, a voluntary return of a prisoner, after an escape, before action brought, is equivalent to a retaking on a fresh pursuit; but it must be pleaded. 2 *Term Rep.* 126.

But fresh suit is no plea, where the escape was voluntary in the sheriff. *R.* 2 *Rol.* 283. *Vide post.* (E).

Or, after an action brought, tho' before plea. *Semb.* 2 *Rol.* 283. *R. cont. Latch*, 200.

So, the sheriff shall not be charged for an escape, if the prisoner goes out of prison with the assent of his creditor; for the *st. W.* 2. 11. says, *sine assensu domini*. 2 *Inst.* 382.

Tho' the assent be only by *parol*, it shall be a bar. 2 *Inst.* 382. *Dy.* 275. a.

But an assent by *parol* after an escape does not discharge the sheriff. *Dy.* 275. a. *in marg.*

So, it will not be an escape, if the sheriff, upon a *habeas corpus*, brings his prisoner to *Westminster*, tho' he goes out of the direct way. *R.* 3 *Co.* 44. *Mo.* 299.

If he has a writ to attend upon the court, commissioners, &c. for a day. 1 *Ch.* *R.* 67.

Tho' he does not go to them. *Per Pemb.* 2 *Sho.* 289. *Cont.* if he goes

goes to another place, *per Raymond and Withens*, 2 *Sho.* 299. *Vide ante* (C).

So, if he goes with a keeper to counsel, &c. when he is in execution for the king's debt, tho' not in the case of a common person, because the gaoler may retake him. *R. Sav.* 29.

So, if discharged upon an *audita querela*, tho' the writ be afterwards vacated. *R. Mo.* 354.

So, if a prisoner, brought by *habeas corpus*, goes out of the custody of the sheriff, and returns the next morning, and appears at the return of the writ. *R. Mo.* 257.

So, if a prisoner goes out of the rules of the prison, with the consent of the plaintiff, without a keeper or rule of court, upon an intent to agree with the plaintiff, and no agreement is made; yet the prisoner shall be discharged upon an *audita querela*. *R. Sti.* 117. *Semb. cont.* if the plaintiff assents upon condition, that it shall not prejudice his execution. *Dy.* 275. a.

(E) When he shall be retaken, &c. after an Escape.

IF the prisoner escapes by negligence of the sheriff, the sheriff may retake him, and he shall not have an *audita querela*. *R. 3 Co.* 32. b. *R. 1 Sid.* 330. *Mo.* 660. *Dub. Sho.* 70. *Adm. Sho.* 177.

Or, he may have an action on the case against the prisoner for his escape; whereby he becomes subject to the action of the party. *D. 3 Co.* 52. b. *Mo.* 660. *R. Mo.* 404. 597. *R. Cro. El.* 53. 237. 1 *Le.* 237. *Lut.* 64.

And this, before an action or recovery against the sheriff, as well as after. *Mo.* 660. *R. Godb.* 125. *Cro. El.* 53.

Tho' the party afterwards acknowledges satisfaction upon record; for that goes only in mitigation of damages. *R. 1 Leo.* 237. *Semb. cont.* if he does not shew specially how satisfied. *Cro. El.* 237.

So, if a prisoner escapes, and afterwards returns to the prison, the plaintiff may admit him in execution, tho' he has a remedy against the sheriff. *Cont. Hob.* 202. *R. acc.* 1 *Vent.* 269. 2 *Lev.* 109. 132.

Or, may retake him by a new *capias ad satisfaciendum*, if the first be not returned and filed. *R. 3 Co.* 52. b.

So, he may retake him in all cases upon a negligent escape; for the sheriff may be insufficient. *R. cont. Hob.* 202. *R. acc.* 1 *Sid.* 330. 1 *Vent.* 4. 269.

So, tho' the escape was voluntary by the gaoler, and without his consent. *R. 1 Sid.* 330. 1 *Vent.* 4. 1 *Lev.* 211. 2 *Mod.* 136. *R. 2 Jon.* 21. *Adm. Sho.* 177. *Semb. cont. Hob.* 202.

And now, by the *st.* 8 & 9 *W.* 3. 27. it is enacted, that if a prisoner in execution in the Marshalsea or Fleet escape by any means, the plaintiff may retake him by *capias ad satisfaciendum*, or sue out any other execution against him, as if never in custody.

So, if a prisoner be dismissed upon a wrongful *audita querela*, he may be retaken, and shall be in execution. *R. Mo.* 354.

So, after an escape, the plaintiff may have debt or a *scire facias* against the defendant upon the former judgment. *R. 1 Vent.* 269. *Cart.* 212. 2 *Jon.* 21. *R. Lut.* 1266. *Sho.* 174. 249.

Tho' it was with his consent subsequent. 1 *Sal.* 271.

Tho' he paid the money to the gaoler. *R. 2 Jon.* 97.

And

And by the *ff.* 8 & 9 *W.* 3. 27. any other kind of execution.

So, if a man taken in execution be rescued, he may be retaken, or a *scire facias* lies against him. *R. Cro. Car.* 240.

But, if the sheriff suffers a voluntary escape, he shall not have an action upon the case against the prisoner. *R. Ma.* 597.

Or, if he retakes him, the prisoner shall have an *audita querela*. *3 Co.* 52. *b.* *R.* 1 *Sid.* 330.

[After voluntary escape gaoler cannot retake prisoner; after involuntary he may, without warrant, and on a *Sunday*. *Barnes*, 373-5 *Term Rep.* 25.]

[A bailiff who has arrested a prisoner on *mesne* process, may retake him before the return of the writ, tho' he voluntarily permitted him to escape immediately after the arrest. *Atkinson v. Matteson*, *B. R. M.* 28 *Geo.* 3. 2 *T. R.* 172.]

So, if the sheriff permits a voluntary escape with consent of the plaintiff, he never can be retaken by the sheriff, or the plaintiff. *R. Sho.* 174. *D.* 2 *Leo.* 119.

If the consent of the plaintiff be precedent to the escape; otherwise, if subsequent. *R.* 1 *Sal.* 271.

Yet, if *A.* permits a voluntary escape, and quits his office to *B.*, to whom the prisoner returns, *B.* ought to detain him; otherwise, it will be an escape in him. 1 *Vent.* 269. 2 *Lev.* 109. *Semb. Mod. Ca.* 183. *Semb. cont. Hob.* 202.

Or, if the office descends to *B.* *R.* 2 *Lev.* 109.

And an action for the escape lies against *A.* or *B.*, if he also permitted an escape, at the election of the plaintiff. *R.* 2 *Lev.* 132.

So, by the *ff.* 1 *Ann.* 6. if any committed to the Queen's Bench or Fleet in execution, on *mesne* process, or contempt in not obeying a decree, escape, on oath of it, a judge shall grant a warrant to all sheriffs, mayors, &c. reciting the cause of commitment, to retake him, who shall be committed to the county gaol where retaken, and not delivered on any account, till the debt satisfied, judgment reversed, or contempt discharged, unless removed for treason or felony, and then he shall remain charged with all causes for which he was retaken.

He cannot be brought before a judge by a day-rule as another prisoner may, to shew cause of action against another. *R. Mod. Ca.* 63.

So, he may be taken upon a *Sunday*. *Mod. Ca.* 95. *Vide Temps*, (B 3.)

But if the party be not taken by lawful authority upon an escape-warrant, if this appears upon the return of the warrant, he shall not be committed to the county-gaol, but to the former prison; as, if brought, not by a constable or other officer, but by persons not known. *Mod. Ca.* 154.

[*A.* resists the service of an order of *Chancery*, is committed for the contempt, goes at large, retaken on an escape-warrant, and committed to *Newgate*; escape-warrant superseded, the contempt not being for not obeying a decree, and *A.* sent to the former prison. *Hinchcliffe v Payne*, *T.* 4 *G. Str.* 99.]

[If a man escapes and returns again, and then commits a second escape, he cannot be taken up for the first escape, it being purged by his return. *Anon. P.* 7. *G. Str.* 423.]

So, if he be discharged by agreement, after commitment upon an escape-warrant, he shall not be afterwards retaken. *Mod. Ca.* 254.

[If

[If the defendant was entitled to his discharge at the time of his escape, and would be entitled to it as soon as taken on the escape-warrant, the court will supersede the warrant. *Webb v. Thompson*, *M. 7 G. Str.* 401.]

[A man taken up on an escape-warrant of a judge, after his patent is determined, shall be discharged. *Carter v. Jewel*, *H. 1 G. 2. Ld. Raym.* 1513.]

[If a prisoner escapes, and plaintiff sends an order for his discharge, the gaoler cannot retake him for his fees. *Willing v. Goad*, *T. 5 G. 2. Str.* 909.]

E S C H E A T.

(A) An Escheat.

(A 1.) For Want of Heirs.

AN *escheat* is when land falls to the lord of whom it is holden. *Co. L.* 13. a. 92. b.

Lands *escheat propter defectum sanguinis, vel propter delictum*. *Co. L.* 13. a.

As, if *A.* seised in fee, dies without heir, the land *escheats* to the lord. *F. N. B.* 143. T.

Or, seised in tail, remainder to himself in fee. *F. N. B.* 144. A.

So, if a bastard dies without issue. *F. N. B.* 144. E.

If the heir be attainted for treason, or felony. *Co. L.* 13. a.

So, if land descends on the part of the father, if there be no heir on the part of the father, the land *escheats*. *Lit. f.* 4.

Or, descends on the part of the mother, if an heir on the part of the mother fails, the land *escheats*. *Lit. f.* 4.

If *A.* be disseised, and then dies without heir, his land *escheats*, and the lord shall have a writ of *escheat* against the disseisor. *F. N. B.* 144. C. *Semb. cont.* that the lord never shall have a writ of *escheat*, except where his tenant dies seised. 32 H. 6. 27. a. *Vide post.* (B 2.)

[If *A.* devises in fee to *B.*, and if he dies without heir, to *C.*; the devise shall be void against the lord by *escheat*. *Vau.* 270.]

[If a man devises to *A.* to sell and pay debts and legacies, and the residue to *B.*, and *A.* dies, and the testator has no heirs, the estate *escheats* to the crown. *Reeve v. Attorney-General*, *M.* 1741, 2 *Atkyns*, 223.]

But if a disseisor makes a feoffment, or dies seised, whereby the land descends, and afterwards the disseisee dies without heir, the land does not *escheat*; for the feoffee, &c. is in by title. *Co. L.* 268. b. *Hob.* 242.

So, if an annuity, rent-charge, advowson, &c. be granted in fee, and the grantee dies without heir; these do not *escheat* to the lord, for they are not held of him, but to the grantor. 1 *Rol.* 816. l. 27. 30.

So, if a corporation be dissolved, their land does not *escheat*, but goes to the donor. *Co. L.* 13. b.

[So, where *A.* by will directed money to be laid out in manors, lands, tenements, tythes, and hereditaments, or very long terms, with limitations

limitations applicable to real estates; on failure of heirs, the crown was held to have no equity against the next of kin to have the money laid out in real estates; for the purpose of claiming by escheat, the quality of land not having been imperatively fixed on the money; since it might have been invested in land, and still continued personalty.

Walker v. Denne, 2 *Ves. jun.* 170.]

[Copyholds cannot escheat. *Ibid.*]

[Whether an equity of redemption, or a trust can escheat, has not been determined. *Fawcett v. Lowther*, T. 1751, 2 *Vesey*, 300.]

(A 2.) For the Offence of the Tenant.

So, if a man seised in fee be attainted for treason or felony, the land escheats to the king, or the lord of whom it was holden. *Vide Forfeiture*, (B 1, &c.)

When the forfeiture or escheat belongs to the king, *vide Forfeiture*, (B 5.)—*Prærogative*, (D 59, 60.)

Escheat for treason or felony happens in three cases; *quia suspensus per collum, quia abjuravit regnum, vel quia utlagatus est. Co. L. 14. a.*

And, if a man has judgment to be hanged, his land escheats tho' he dies before execution, and the writ shall say, *quia suspensus. F. N. B. 144. H.*

But, if the felony be pardoned before attainder, the land does not escheat to the lord. *Ow. 87.*

So, if *cestuy que trust* dies without heir, the lord shall not have the trust by escheat; for the feoffee continues tenant to the lord, and shall hold the lands discharged of the trust. *Hard. 496.*

(B) Writ of Escheat.

(B 1.) When it lies.

A writ of escheat lies by the lord, when his tenant in fee-simple dies without heir. *F. N. B. 143. T.*

And if the lord dies before the writ sued, his heir shall have it. *F. N. B. 144. D.*

So, the successor of an abbot, bishop, &c. *F. N. B. 144. L.*

So, tenant for life of a feigniory, or by curtesy, or in dower. *F. N. B. 144. M.*

So, if tenant in tail with the fee expectant to himself, dies without heir, the lord shall have a writ-escheat; for the tenant in tail held his reversion of him. *F. N. B. 144. A.*

Or, if tenant in fee be disseised, and afterwards dies without heir. *F. N. B. 144. C.*

A writ of escheat lies; tho' the lord accepts the rent of him in possession. *F. N. B. 144. O.*

And the process shall be summons, *grand cape*, and *petit cape*, as in a *præcipe quod reddat. F. N. B. 144. O.*

For the proceeding in escheat, *vide Pleader* (3 C).

(B 2.) When not.

But if tenant in tail dies without issue, he in reversion or remainder shall not have a writ of escheat, but a *formedon. F. N. B. 144. A.*

So,

So, if he in remainder after an estate for life dies without heir, and then the tenant for life dies, the lord shall not have a writ of escheat, but intrusion; for the tenant for life was tenant to the lord. *F. N. B. 144. B.*

So, if the tenant be disseised, and dies without heir, when his entry is congeable, the lord shall not have a writ of escheat; for he never shall have a writ of escheat except where his tenant dies seised; but he may enter. *32 H. 6. 27. a.*

If the entry of the tenant was not congeable, he cannot enter, nor have a writ of escheat. *32 H. 6. 27. a.*

So, if the lord accepts any corporal service; as, homage or fealty of him in possession, he shall not afterwards have a writ of escheat. *F. N. B. 144. O. Co. L. 268. a. 4 H. 6. 21. a.*

Tho' it be accepted of a disseisor. *Co. L. 268. a.*

So, if he avows in a court of record for rent due from the tenant, or disseisor. *Co. L. 268. a.*

Or, accepts rent of the heir or feoffee of the disseisor, where the descent or feoffment was after the escheat. *Co. L. 268. a.*

But, if the lord accepts rent of the tenant, this does not bar him of a writ of escheat. *Co. L. 268. a. 4 H. 6. 21. a.*

So, tho' he accepts rent of the disseisor, his tenant. *Co. L. 268. a.*

(C) The Office of Escheator.

BY the common law there were two escheators, the one *ultra Trentam*, and the other *citra Trentam*, who had sub-escheators, and to whom it belonged to inspect the escheats, wards, and other casualties which fell to the crown. *Co. L. 13. b. 92. b.*

In the time of *Ed. 2.* there was an escheator constituted in each county for life; and so it continued until the time of *Ed. 3.* *Co. L. 13. b.*

By the *st. 14 Ed. 3. 8.* an escheator was appointed by the treasurer for each county; and ought to continue only for a year.

By the *st. 1 H. 8. 8.* he should not be named, who was an escheator within three years before.

The mayor, &c. of a city, &c. may be an escheator, by grant, or prescription. *R. Ley, 5.*

By *stat. 4 Ed. 4.* the mayor of London *pro tempore* is constituted escheator within *Southwark.* *Hard. 11.*

An office, taken by an escheator out of his precinct, will be void. *Semb. Hard. 12.*

E S C U A G E.

Vide Homage (E).

E S G L I S E.

(A) A Church, how erected.

THE nature of an advowson of a church, appendant, or in gross, and the grant of it, or of the next avoidance. *Vide in Advowson, (A—B—C 1, 2.)*

The

The appropriation, or union of churches. *Vide in Adwouſon, (D 1, &c.—E—F 1, 2.)*

By the common law any one might build a church in his ſoil, without licence of the king, or any other. 3 *Inſt.* 201.

And this privilege was claimed by the barons of the realm. *Seld. de Dec.* 360. *Dub. Cod. Ju. Eccl.* 212.

But it ſhall not be taken as a church, till it be conſecrated by the biſhop. 3 *Inſt.* 203. *Seld. de Dec.* 85.

And this was decreed by a council under *Wilfrid* archbiſhop of *Canterbury*, anno 816. *Seld. de Dec.* 261. c. 9. f. 4.

And afterwards, by the *Canon* anno 1102, no church can be erected without endowment. *D. of Pluralities*, 80. *Cod. Ju. Eccl.* 212.

So, by the canon law, none can build a church without licence of the biſhop. *Co. Ju. Eccl.* 212.

(B) A Cathedral.

A Church is either *major*, as a cathedral; or *minor*, as a pariſh-church, &c. *Lind.* 9.

The cathedral is the ſee of the biſhop, *ſedes episcopi*. 2 *And.* 168.

And cannot be conveyed to another, without the biſhop. *Qu.* 2 *And.* 168.

The king by his patent may create a church *et ambitum eccleſiæ*, a cathedral. *Jon.* 166.

(C) A Pariſh-Church.

ABOUT the year 700 the *Saxons*, in large diſtricts, founded churches for themſelves and their tenants; which were the original of pariſh-churches. *Seld. de Dec.* 259. c. 9. f. 4.

Within thoſe diſtricts other churches were afterwards erected, which in proceſs of time have obtained tithes, burial, and baptiſm, and thereby become pariſh-churches. *Seld. de Dec.* 262. c. 9. f. 4. *D. of Plu.* 92.

And therefore, every church, having burial, baptiſm, and tithes, is now eſteemed a pariſh-church. *Seld. de Dec.* 265. c. 9. f. 4.

Or burial, & *ſacramentalia*. 2 *Inſt.* 363.

A Vicarage.

As to a vicarage, *vide Eccleſiaſtical Perſons, (C 10, &c.)*

(D) A Chapel.

A Church built within the precinct of a pariſh-church, to which burial and ſacraments belong, is a chapel of eaſe. 2 *Rel.* 340. l. 50.

And it belongs to the pariſh-church, and the parſon of it. 2 *Rel.* 341. l. 2.

And therefore, a pariſh-church cannot be a chapel. 2 *Rel.* 340. l. 55.

The parſon of a pariſh-church ought to find a chaplain for a chapel of eaſe within his precinct.

But he may officiate there himſelf.

[If a chapel has parochial rights, as clerk, wardens, &c.; rights of divine service, as baptism, sepulture, &c.; and the inhabitants have a right to them there, and not elsewhere, and the curate has small tithes and surplice-fees, and an augmentation; it is a perpetual curacy, and the curate is not amovable at pleasure. *Attorney-General v. Brereton*, T. 1752, 2 *Vesey*, 425.]

[Nomination to a perpetual curacy may be by parol, as well as presentation to a church. *Ibid.*]

(E) The Church-yard.

THE cemetery *circa ecclesiam majorem 40 passus, circa minorem 30 continere debet.* Lind. 253. *verb. Claus. Cemeterii*, 267. *verb. Cemeteriis.*

As to the church-yard, the privileges, and burial there. *Vide Cemetery.*

(F) Churchwardens.

(F 1.) How chosen.

BY the *canon* 1^o, *Jac.* 89. all churchwardens shall be chosen by joint consent of the minister and parishioners, if it may be; but if they cannot agree, the minister shall choose one, and the parishioners another.

And, by common right, the election ought to be by the whole parish. *Hard.* 379.

[Of common right the parson shall choose one, and the parishioners the other. *Hubbard v. Penrice*, H. 19 G. 2. *Str.* 1246.]

[A curate stands in the place of the parson for the purpose of nominating one churchwarden, and a curate may make a presentment. *Ibid.*]

By *canon* 90. the election shall be yearly in *Easter* week.

[If the parson and parishioners neglect, yet the ordinary has no jurisdiction; the proper way is *mandamus* à B. R. *Stutter v. Preston*, E. 3 G. Str. 52.]

If the bishop or ecclesiastical court make an order that a select vestry shall chuse, this does not exclude the other parishioners, if they will be present at the vestry. *R. Lane*, 21.

But, by custom, they may be chosen by the parishioners, without the parson. *R. 2 Rol.* 234. l. 15. 2 *Cro.* 532.

If they are incorporated to be chosen by the parishioners, they ought to be chosen by all the parishioners assembled. *R. Lane*, 21.

[The parson or vicar cannot adjourn the vestry, but the majority of the parishioners. *Stoughton v. Reynolds*, T. 9 & 10 G. 2. *Fert.* 168. *Str.* 1045. *B. R. H.* 274.]

So, by custom, the election shall be by a select vestry, and not by the whole parish. *R. Hard.* 379.

[Where there is a custom for chusing churchwardens, and it cannot take place, they must resort to the canon. *Catten v. Barwick*, H. 5 G. Str. 145.]

So, for misbehaviour, the parishioners may discharge them, and chuse others. *Lamb. ch. sect.* 3.

By the *canon* 1^o, *Jac.* 89. they shall continue in office but one year, except chosen again in like manner. But,

But, by *can.* 118. they shall be reputed to continue till new churchwardens sworn.

The churchwarden being chosen, cannot be refused by the archdeacon, or spiritual court, on pretence of poverty, or other inability. *R. 1 Sal. 166. 5 Mod. 326.*

[The right of naming a churchwarden cannot be tried in court-christian. *1 Bl. Rep. 28.*]

[The bishop's court cannot try the legality of votes for a churchwarden. *Rex v. Harris, T. 3 G. 3. 3 B. M. 1420, 1 Bl. Rep. 430.*]

And if he be refused, a *mandamus* lies for swearing him. *Vide Mandamus.*

Churchwardens may be required by the spiritual court to take an oath.

But no oath shall be required of them, except in general to execute their office. *Hard. 364. Vide Prohibition.*

Nor, can a fee be demanded for swearing them, or taking their presentments. *R. 1 Sal. 330.*

And attorney of *B. R.*, &c. may have a writ of privilege to excuse him; and if it be not obeyed by the spiritual court, a prohibition. *2 Rol. 368.*

So, if any who has privilege be chosen, a writ goes to the ecclesiastical court that he be not sworn. *R. Pal. 392.*

Churchwardens are lay-persons, tho' ecclesiastical officers. *Per Hale, Hard. 379. (Vide 2 Rol. 71. 1 Sal. 166. 5 Mod. 326.)*

(F 2.) Their Duty.

By the *canon 1^o, Jac. 89.* they shall in a month after the end of the year give account of all monies received and disbursed, and deliver up to parishioners what is in their hands. *Vide post. (F 3.)*

By *canon 90.* they shall see that all parishioners resort to divine service, and continue the whole time; and present those remiss, &c.

By the *st. 2 & 3 Ph. & M. 8.* and *5 El. 13.* they are to receive and bestow on the highways in the parish the forfeitures collected by the bailiff or head constable, for defaults of repairing highways.

By the *st. 1 El. 2.* they are to levy 12*d.* forfeited for not resorting to the parish-church, &c. to the use of the poor, by distress upon the goods or lands of the party.

By the *st. 43 El. 2.* they (and the overseers) are to set the poor to work, and to raise by taxation of every inhabitant, parson, vicar, occupier of lands, houses, tithes, coal mines, or saleable underwood, a stock of materials, and also money for the relief of the impotent poor, and to put out poor children apprentices; and may levy such rates by warrant from two justices upon the party's goods, and in four days after the end of the year shall account, and deliver over the money, &c. in their hands to their successors.

[There cannot be a rate to reimburse churchwardens. *Dawson v. Wilkinson, T. 10 & 11 G. 2. B. R. H. 381. And. 11. 2 Ld. Raym. 1009.*]

[But where an overseer is in advance for the parish, he may get a rate for the relief of the poor, and reimburse himself out of the money thereby raised. *Tarney's case. H. 2 Ann. 2 Ld. Raym. 1009*]

[And the justices are compellable to sign and allow such rate. *Ibid.*]

[A rate cannot be made to repay money borrowed to repair and rebuild a workhouse. *Rex v. Wavell, E. 19 Geo. 3. Dougl. 115.*]

[A private act enabled the overseers, &c. to make a rate for the relief of the poor, and to include in it such just and reasonable sums as they shall be put to in the execution of their offices; they made a rate, the title of which expressed it to be for both those purposes; and *B. R.* would not quash it, tho' the sessions on an appeal stated in a case that it was partly made to pay a debt incurred by the late overseers, the rate itself appearing on the face of it to be legal. *Rex v. Gloucester, T. 33 Geo. 3. 5 T. R. 346.*]

[If a parish consists of several vills, and there is a custom to levy the rates in certain proportions, they must pursue it, whether reasonable or not. *Burton v. Wileday, M. 11 G. 2. Andr. 32.*]

By the *st. 1 (or 2) Jac. 9.* they are to levy the penalties upon ale-house-keepers, &c. for suffering tippling in their houses, &c. by distress on the offender's goods.

By the *st. 3 Jac. 4.* they are yearly to present the monthly absence from church of popish recusants, and the names and age of their children, and the names of their servants at the general or quarter sessions, under the penalty of 20*s.* for every default.

They may take off the hat of any who wears it in church at the time of divine service, without a prosecution in the spiritual court. *R. 1 Sand. 13. 1 Lev. 196. 1 Sid. 301.*

Churchwardens for neglect of their duty may be sued in the spiritual court.

As, if they take the bells out of the church. *1 Sid. 281, 2.*

Or, an action lies against them by their successors. *1 Sid. 282.*

So, an indictment lies, if they take money, &c. *corruptè, colore officii,* and do not account for it. *R. 1 Sid. 307.*

So, they may be removed for misbehaviour, and others chosen before the year expires. *Lamb. Off. Ch. sect. 3.*

But, to a suit in the spiritual court to compel them to account, after account allowed by the minister and parishioners, a prohibition lies. *R. 2 Rol. 71.*

[The spiritual court has no jurisdiction to settle a churchwarden's accounts. *Adams v. Russh, T. 13 G. 2. Str. 1133.*]

It may compel them to deliver in their accounts, but cannot decide on the propriety of the charges; and if it take any steps, after the accounts are delivered in, it is an excess of jurisdiction, for which a prohibition will be granted, even after sentence. *3 T. R. 3.*

And no suit shall be against them by their successors for a thing done *ratione officii.* *R. Godb. 279.*

(F 3.) Their Power.

Churchwardens may maintain trespass, or other action possessory, against any who wrongfully take the bells, books, or other goods of the church; for tho' the property is in the parishioners, the custody and possession belong to them. *R. 11 H. 4. 12. a. R. 1 Rol. 57. Vide ante, (F 2.)*

Tho' another parishioner, or the vicar himself, takes them. *R. 11 H. 4. 12. a.*

Tho' the goods were bought by the parishioners themselves; for when

when they are given into the custody of the churchwardens, an action lies by them. 11 H. 4. 12. a.

And the declaration may be *ad damnum ipsorum*, or, of the parishioners. R. Cro. El. 179. 8 Ed. 4. 6. b. Dal. 105. *Vide infra*.

So, they may have an appeal of robbery for such goods stolen. 12 H. 7. 27. b.

So, they ought to have the action; for a suit for them by the parson in the spiritual court shall be prohibited. R. 1 Rol. 57.

The declaration may be, that they were possessed *de bonis ecclesiæ*, or, *parochianorum*. Dub. 1 Vent. 89.

And the succeeding churchwardens shall maintain trespass, &c. for goods taken in the time of their predecessors. 12 H. 7. 28. a. R. Cro. El. 145. 179. Dub. Dal. 105. R. 1 Leo. 177.

But the trespass ought to be alleged in the declaration only *ad damnum parochianorum*. R. Cro. El. 179. [*Vide Whitmore v. Bridges*, H. 9 Geo. 1. in Canc. MSS. 4 Vin. Abr. 525.] *Vide supra*.

And if one releases, it does not bar his companion. R. 2 Cro. 234. Tel. 173.

So, if goods are given to a parish or church, the churchwardens may take them; for they are a corporation for such purpose. 12 H. 7. 29. a.

And the successors may have account for them against their predecessors. 8 Ed. 4. 6. b. 1 Vent. 89.

So, if goods are put into the church to be there used; for that is a gift. Lamb. Ch. sect. 2.

So, churchwardens may have an action against any one who defaces a monument, &c. Godb. 279.

But churchwardens cannot purchase or take lands given to the use of the parish; for they are not a corporation for lands. R. 12 H. 7. 29. a. 1 Rol. 393. l. 10.

Neither can they make a lease of lands given to feoffees for the use of the parishioners. R. 12 H. 7. 29. a. 13 H. 7. 10. a.

Nor, maintain trespass or other action for entry, or taking the profits of such land. 12 H. 7. 29. a.

Or, for breaking the windows, walls, &c. of the church, or cutting down trees in the church-yard.

Yet by the custom of London, churchwardens are a corporation to purchase and demise lands. 2 Cro. 532. Jon. 439.

So, churchwardens cannot sue for a legacy, or a thing never in their possession, by action at common law.

[Churchwardens cannot commence a suit after their year is expired. *Dent v. Prudence*, M. 3 G. 2. Str. 852.]

[Churchwardens *de facto* may maintain an action against a former churchwarden for money received by him for the use of the parish, tho' the validity of the plaintiff's election to the office be doubtful, and tho' they be not the immediate successors of the defendant. *Turner v. Baynes*, C. P. M. 36 Geo. 3. 2 H. Bl. 559.]

So, one only cannot dispose of the goods, without his companion. 2 Cro. 234.

Nor, both together; for the law does not give them power to do any thing to the disadvantage of the church. 13 H. 7. 10. a. Tel. 173. R. 1 Rol. 393. l. 20. 1 Rol. 426.

Yet a disposition by them, with the consent of the parish, shall be good. 1 *Rol.* 393. l. 26.

Or, the sending a bell, with consent, to be cast, shall be a discharge upon account, tho' no bar to an action. *R.* 1 *Vent.* 89.

(G 1.) To whom the Freehold of the Church belongs.

THE soil and freehold of the church and church-yard belong to the parson. 2 *Cro.* 367. *Vide Ecclesiastical Persons*, (C 9. 14.)

And therefore, the parson alone may give a licence for burying in the church. *R.* 2 *Cro.* 367. *Noy*, 104. *Vide Cemetery* (B).

So, he may make a lease of the church and church-yard. 2 *Rol.* 337. l. 10.

And shall have the trees growing in the church-yard for the repair of the church.

(G 2.) To whom the Repairs and Ornaments.

By the custom of *England*, the repair of the chancel belongs to the parson. 2 *Inst.* 489. 1 *Sal.* 165.

Or, if there be a perpetual vicar, to the vicar. 2 *Rol.* 337. l. 15.

But, by custom, the repair of the chancel as well as of the church, in *London*, belongs to the parishioners. *Per Holt*, 1 *Sal.* 165. *Lind.* 53.

The repair of a private chapel belongs to the owner; tho' it be annexed to the church. 2 *Inst.* 489.

So, by the custom of *England*, the repairs in *nave ecclesie* belong to the parishioners of the same parish. 2 *Inst.* 489, 653. *Lind. de Off. Archid.* 53.

So, the repair of a public chapel annexed to a church. 2 *Inst.* 489.

So, the parishioners are to find ornaments to the church, as well as other repairs; as, bells, seats, &c. 2 *Inst.* 489.

The inhabitants of a chapelry, who antiently repaired the church, shall not be exempted by disusage. *R.* 1 *Sal.* 164.

If men usually repair a chapel of ease, and have divine service there, but have burial in the mother-church; they are not by that excused from the repair of the mother-church. *R.* 2 *Rol.* 289. l. 50. *Hob.* 66. *Semb.* 3 *Mod.* 264.

If a man resides in one parish, and occupies land in another parish, he shall be charged to the repair of the church where the land lies; for he is a parishioner there, and may resort to the parish meetings. *R.* 5 *Co.* 67. *Cro. El.* 659. *R.* 2 *Rol.* 289. l. 20.

So, to bells; for they are as necessary as the repair of the steeple. *R.* 1 *Sal.* 164.

If the major part of the parish at a vestry agrees to make repairs, the others are bound.

Tho' it be to find ornaments; as, new bells, &c. *R.* 2 *Rol.* 291. l. 20. 1 *Sal.* 164.

But a rate made only by the churchwardens is not sufficient. *R.* 1 *Sal.* 165. *Dub.* 1 *Vent.* 367. if the parish refuse.

[Churchwardens, with consent of ordinary, may ornament a church (as by erecting an organ) with consent of the parish. *Butterworth v. Walker*, P. 5 G. 3. 3 B. M. 1689.]

[But

[But the parish are not bound to repair such, when set up. *Butterworth v. Walker*, P. 5 G. 3. 3 B. M. 1689.]

[A select meeting or vestry does not bind the parish, without immemorial usage. *Ibid.*]

But for ornaments a parishioner is liable only in respect of his personal estate. R. 2 Rol. 291. l. 5.

So, for ornaments *de novo* which were not antiently there, an inhabitant of another parish is not chargeable, tho' he occupies land there. R. 2 Rol. 291. l. 10. *Per two J. Bul.* 20. *cont.* by the canon law. *Deggs*, part 1. ch. 12. R. 3 Mod. 211.

Nor, for any ornaments. R. 1 Rol. 291. l. 10.

Yet for bells he shall be charged; for they are as necessary as the steeple itself. R. Sal. 164.

So, a man shall not be charged to the repair of the church, in respect of land, which he has in another parish. R. 5 Co. 67. R. 2 Rol. 289. l. 30.

Nor, in respect of rent of land in lease to another in the same parish; for there is another inhabitant chargeable for it. R. 5 Co. 67. b. R. 2 Rol. 289. l. 25. 4 Mod. 148.

So, he shall not be charged for a stand in a market in the same parish, when he inhabits in another parish. R. 2 Rol. 289. l. 35.

[A man shall not be charged to the repairs of a church, in respect of a light-house. *Rebow v. Bickerton*, in Sc. T. 1721, *Bunb.* 81.]

So, the inhabitants of an hamlet, who have a chapel of ease, may prescribe to be discharged from the repair of the mother-church. R. 2 Rol. 290. l. 22. *Hob.* 67. *Acc.* 2 Lev. 102.

As, if they repair the chapel and the wall of the church-yard at the mother-church. R. 2 Rol. 290. l. 30.

Or, contribute 3s. 4d. yearly to the repair of the mother-church. R. 2 Rol. 290. l. 45.

So, if they have repaired the chapel, and have used to marry and bury there, and never repaired the mother-church. *Semb. cont.* 2 Rol. 290. l. 10. R. *acc.* 1 Sal. 165.; for then it shall be deemed coeval with the church.

So, if they repair the chapel, and have divine service, sacraments, a chapel-warden, and seats there, and nothing in the mother-church, but burial in the church-yard. *Semb.* 2 Lev. 186.

(G 3.) The Seats.

The disposal of all seats *in nave ecclesie* belongs to the ordinary. *Adm.* 8 H. 7. 12. *Per Co. Godb.* 200. 2 Bul. 150.

And, generally, the ordinary may place or remove persons there at his pleasure.

A prescription by the parishioners to dispose without the interposition of the ordinary, will be void. 1 Sal. 167. R. 2 Lev. 241.

So, if a chapel to a monastery, after the dissolution has always been used there as a parish-church, the ordinary may have the disposition of the seats there, tho' he had it not originally.

So, if an aisle of a church be always repaired at the common charge of the parish, the ordinary may dispose of the seats there. 2 Cro. 366.

But a man may prescribe for the sole enjoyment of a seat in an aisle, or choir of a church. R. 3 Inst. 202. 2 Rol. 288. l. 10.—R. if he has used to repair it. 2 Cro. 366. R. Mo. 878.

So, for a seat in a chancel. *Noy*, 133.

So, for a seat in nave ecclesia. *Hob.* 69. *R. cont. Mo.* 878. *Acc.*

1 *Sid.* 89. *Godb.* 200.

So, for the first, second, or other place in the seat. *Noy*, 133. 73.

1 *Sid.* 89.

So, for a seat in an aisle of a church of another parish. *R.* 1 *Sid.* 361.

So, a custom, that the churchwardens repair and make new seats, when there is occasion, and, with the consent of twelve parishioners, place or displace the inhabitants there according to their quality, at their discretion, shall be good against the ordinary. *R.* 2 *Roll.* 24.

And if a man be disturbed by the parson, ordinary, or churchwardens by suit in the spiritual court, he may have a prohibition. 2 *Cro.* 366. *R.* *Godb.* 200.

So, if he be disturbed by them or any other, he may have an action upon the case. 2 *Cro.* 605. *R.* 1 *Sid.* 88. 203. 1 *Lev.* 71. *R.* 2 *Jon.* 3. *R.* 2 *Lev.* 193. *R.* 3 *Lev.* 73. *Vide Action upon the Case for a Disturbance*, (A 3.)

[But possession alone of a pew in a church, tho' for above sixty years, is not a sufficient title to maintain an action on the case, even against a wrong-doer for disturbance in the enjoyment of it; but the plaintiff must prove a prescriptive right or a faculty; and should claim it in his declaration, as appurtenant to a messuage in the parish. 1 *Term. Rep.* 428.]

[But possession for a length of time, as for thirty-six years, where the pew is claimed as appurtenant to a messuage, is a good presumptive evidence of a faculty. *Ibid.* 431.]

[*Trespass* will not lie for entering into a pew, because the plaintiff has not the exclusive possession, the possession of the church being in the parson. *Id.* 430.]

Yet, to entitle himself to a prohibition, he ought to suggest some ground for such a prescription; as, repair. *R.* *Hob.* 69. *R.* 2 *Cro.* 366. *Noy*, 104. *R.* 1 *Sid.* 89.

Or, for a seat in the chancel, that he has the rectory impropriate; for the rector ought to repair the chancel. *Noy*, 133.

So, in an action on the case, tho' he need not allege an usage to repair in the declaration, yet he ought to give it in evidence at the trial. *R.* 1 *Sid.* 88. 203. *Lev.* 71. *Buxton and Bateman.* *R.* that he need not allege it in the declaration. 2 *Jon.* 3. *R.* 3 *Lev.* 73.

[In an action against a stranger for disturbing plaintiff in his pew, he need not lay, nor prove if laid, that he has repaired; for possession is sufficient: but if the dispute is with the ordinary, title or consideration must be laid and proved. *Kenrick v. Taylor*, P. 25 G. 2. 1 *Wils.* 326.]

Yet a prescription for a seat as to his manor, where he has no house in the parish, is not good, tho' an usage to repair be suggested. *Semb.* 2 *Mod.* 283. (*Vide Hob.* 69.)

As to burial in the church, or church-yard, *vide Cemetery* (B).

So, as to tombs, monuments, &c. *Ibid.* (C).

(H) Presentation to a Church.

(H 1.) What are Presentative.

BEFORE the time of king *John*, the king and other founders of abbeys and priories used to present the abbots and priors. 2 *Rol.* 342. l. 20.

But by king *John*, abbots and priors, as well as bishops, were made elective. 2 *Rol.* 342. l. 23. *Co. L.* 134. a.

So, there may be a presentation to a deanry. 2 *Rol.* 342. l. 32.

To an hospital. 2 *Rol.* 342. l. 33.

To a parish-church.

To a chapel. 2 *Rol.* 342. l. 34.

To an archdeaconry. 1 *And.* 241.

To a prebend; for if they are in a layman, he ought to present to them.

But there is no need of a presentation to a donative. *Vide Donative.*

So, if a bishop be seised of an advowson, and the church becomes void; the bishop shall not present to another, but shall make collation himself. 11 *H.* 4. 9.

(H 2.) By whom it shall be.

(H 2) *Who shall be patron.*] A presentation, regularly, ought to be made by the very patron.

As, if a man be seised of an advowson in fee, in tail, or for life, *Vide Advowson (A).*

Or, has a grant of the next avoidance. *Vide Advowson, (C 2.)*

[If mortgagee in fee presents to a living, a court of equity will interrupt that presentation, and compel the ordinary to institute the clerk of the mortgagor, at any time before foreclosure. *Gally v. Selby, M. 7 G. in Canc. Str.* 403.]

[The court will order the mortgagee of a perpetual advowson to present the nominee of the mortgagor, if he will bring the money into court, or give security to redeem. *Robinson v. Jago, P.* 1723, *Bunb.* 130.]

[The mortgagee of a naked advowson must accept of the nominee of the mortgagor, and present him on an avoidance. *Mackenzie v. Robinson, T.* 1747, 3 *Atkyns*, 559.]

If a man, seised of an advowson in fee, be also parson of the same church, and dies; his heir shall present, tho' the church became void at the time of the descent; for where two titles concur in the same instant, the elder shall be preferred. *R.* 3 *Lev.* 47.

But, if the patron dies after the avoidance happens, his executor or administrator shall present, and not the heir.

So, if a *feme-covert* dies after the avoidance of a church, which she has, her husband shall present. *Co. L.* 120. a.

If a villein purchases an advowson, his lord, after avoidance, may present, without a prior entry. *Co. L.* 120. a.

By common right, the parson, and not the patron of the parsonage, shall be the patron of vicarage. 2 *Rol.* 336. l. 7. 30. 1 *Rol.* 231. l. 3.

So, if a church be appropriated, the parson appropriate shall be patron

patron of the vicarage; for he is founder, the vicarage being derived out of the parsonage. 2 *Rol.* 336. l. 12. 25. *Cont. per Ld. Chan.* 1 *Ver.* 42. But there was a lessee of a parson impropriate.

Yet a layman may be a patron of a vicarage. 2 *Rol.* 336. l. 20.

And the same person may be patron of the parsonage, and also of the vicarage. 2 *Rol.* 336. l. 22.

So, by prescription, a vicarage may be appendant to a manor; for perhaps by grant of the parson or composition, it was annexed to the manor before time of memory. R 2 *Rol.* 336. l. 30. 1 *Rol.* 231. l. 6.

Or, parishioners may prescribe to chuse a vicar. 2 *Rol.* 304.

If a vicarage becomes void in the time of the vacation of the parsonage, the patron of the parsonage shall present. 2 *Rol.* 346. l. 5.

So, by common right, the bishop is patron of all his prebends. 3 *Co.* 75. b.

And of a provendry, deanry, &c. within his bishopric. 2 *Rol.* 346. l. 3.

And the archbishop of the deanry of his archbishopric. 2 *Rol.* 345. F.

[But the right of election to the office of a canon residentiary in *Chichester* church, is in the dean and chapter; and the bishop cannot, under pretence of his visitatorial authority, present to the office by lapse. 1 *T. R.* 652.]

[If trustees have a right to elect and present, all must join, or it is not good in law. *Attorney-General v. Scott*, H. 1749, 1 *Vesey*, 413.]

[If the trustees being equally divided between *A.* and *B.*, there is no election; and on the death of one who voted for *A.*, those who voted for *B.* being a majority, including proxies, meet without notice, and sign a presentation to *B.*; a court of equity will not order the other trustees to sign it. *Ibid.*]

[If trustees have been appointed by a decree to elect and present a minister, the right of election shall not again devolve to the parish at large; popular election being the worst way of nominating, and what all courts should, if possible; avoid. *Ibid.*]

[On application to this court, it will direct a meeting to fill up trustees; the first named trustee to give notice 14 days after avoidance to all the trustees to meet and elect: if all the trustees were dead, the court would direct new ones. *Ibid.*]

[Tho' such minister elected was, by an ancient decree, to be approved of by assistant preachers; yet if that has been long disused, the court will not require it. *Ibid.*]

(H 3.) *Presentation in turn.*] Parceners seised of an advowson may join in presentation. *Co. L.* 166. b. 186. b.

And if they cannot agree to make presentation jointly, they ought to present severally in turn. 2 *Rol.* 346. l. 20.

[If two parceners cannot agree in one person, the court of Chancery will direct them to draw lots who shall have the first presentation. *Seymour v. Bennet*, M. 1742, 2 *Atkyns*, 482.]

[Prerogative presentations are not turns to deprive a patron of his turn. *Grocers' Company v. Archbp. of Canterbury*, T. 11 G. 3. 3 *Wils.* 214.]

The eldest parcener shall have the first turn. *Co. L.* 166. b. 186. b. 2 *Rol.* 346. l. 20.

And

And this privilege goes to her heir. *Co. L. 166. b. 186. b.*

Or, her assignee. *Co. L. 166. b. 186. b.*

And if she takes husband, and dies after issue born, whereby her husband is tenant by the curtesy, it goes to the husband. *Co. L. 166. b. 16. b. Cro. El. 19.*

[If two sisters parceners present jointly, then marry, and settle their estates, and die; the husband of the eldest, tenant by the curtesy, shall present first, as assignee; for the grantees of parceners have the same privileges as the parceners themselves. *Buller v. Bishop of Exeter, M. 1749, 1 Vesey, 340.*]

So, if two parceners assign their parts of an advowson severally, they may present by turn; for they are not mere tenants in common. *R. Cro. El. 19.*

But parceners may make a composition to present out of turn.

[*A.* has two turns, *B.* one; *A.* is to present to the first turn, but it is not said who is to present to the second or third. *A.* presents to first and to second: it shall be presumed it was by agreement; and *B.* shall present to the third. *Grocers' Company v. Archbp. of Canterbury, T. 11 G. 3. 3 Wilf. 214.*]

And, if upon partition the whole advowson be allotted to the youngest, she alone shall present.

Tho' the partition was in *Chancery*, and one within age; for it is good till it be defeated. *2 Rol. 346. l. 45.*

And if the partition be avoided, they may afterwards present in turn, or by composition. *2 Rol. 347. l. 5.*

Yet, a composition to present out of turn, does not bind without deed. *2 Rol. 346. H.*

If there be parceners, one of full age, and the other within age and in ward of the king; the king shall have the presentation, or first turn. *2 Rol. 343. l. 41. Sho. 208.*

If the eldest parccner joins with one of the other parceners in a presentation, the bishop may refuse all, when the other parccner, who did not join with the eldest, also presents, and need not take the presentee of the eldest; because she did not present severally. *Co. L. 186. b.*

So, joint-tenants and tenants in common may join in presentation. *Co. L. 186. b.*

And, if they present severally, the ordinary may refuse to admit their clerk. *Co. L. 186. b.*

So, if one only presents, without the others. *Co. L. 186. b.*

So, joint-grantees of the next avoidance ought to join in presentation.

And if one alone presents, the ordinary may refuse. *2 Rol. 348. l. 45.*

Yet where there are three grantees, and two of them present the other who is a clerk, the ordinary cannot refuse him; for he cannot join in a presentation of himself. *2 Rol. 348. l. 40.*

(H 4.) *When the turn is served.*] If upon a presentation the church be full, the turn shall be served, tho' the presentation be afterwards avoided.

As, if an incumbent be deprived, *quia mere laicus*; for the church was full till the declaratory sentence. *2 Rol. 347. l. 35. 5 Co. 102. Vide post. (M).*

Or,

Or, deprived for herefy, or other crime. 2 *Rol.* 347. l. 30.

But if a presentation be wholly void, it shall not serve for a turn; as, if *A.* be presented, instituted and inducted, and afterwards does not read the 39 articles; for which the *st.* 13 *El.* 12. makes the presentation, &c. void. 2 *Rol.* 347. l. 50. 5 *Co.* 102. b.

So, if after deprivation *A.* be presented, &c. and then the deprivation is reversed, and the first incumbent restored; the presentation of *A.* shall not serve the turn. *R.* 2 *Rol.* 347. l. 40. 5 *Co.* 102.

If the guardian of the youngest parcener within age marries the eldest, and afterwards presents in the name of both; this shall not serve the turn of the eldest. 2 *Rol.* 347. l. 20.

If a dispensation be granted, upon a cession, *tenere in commendam*, and confirmed by the king; this does not serve the turn of the king. *R. Sal.* 541.

If *A.* and *B.* ought to present by turn, and *A.* usurps upon the turn of *B.*, he shall not lose his own turn. *Semb. F. g.* 250.

(H 5.) *Presentation by the king as patron.*] If the king be seised of an advowson, in which the church exceeds the value of 20 marks, he himself shall present. 38 *Ed.* 3. 3. b.

And if the chancellor presents, upon a supposition that it was under such value, and before induction the king presents, his presentee shall be admitted; or, being refused, shall have a *quare impedit*. 38 *Ed.* 3. 3. b.

But, after induction, such presentee of the chancellor shall not be removed. 2 *Rol.* 189. l. 5. *Hob.* 214.

Except, where the presentation by the chancellor takes notice, that it was under that value, when it is not so; for then the king is deceived. 2 *Rol.* 189. l. 10. *Hob.* 214.

But to a church of the crown, under the value of 20 marks, the chancellor shall present. 38 *Ed.* 3. 3. b.

Or, of 20 *l.* *Hob.* 214.

So, if a church belongs to an infant in ward of the king. *Mo.* 874. *Vide post.* (H 6.)

(H 6.) *By his prerogative.*] If the king's tenant of a manor dies, his heir within age, who is in ward to the king, and during the wardship a church of the ward becomes void, the king shall present. *Vide ante*, (H 5.)

Tho' the church becomes void before seizure of the ward.

So, if it was void in the life of the tenant, and continued void at his death, the king shall present.

Tho' the tenant presented in his lifetime, and there was institution upon it, but he died before induction.

Tho' the tenant died after a lapse to the bishop, but before his collation.

Tho' the king does not present till the heir sues livery.

Or, the church does not become void till tender of livery by the heir, if the livery be not sued.

So, if the king grants over the ward.

So, if an archbishop or bishop dies, and during the time that the temporalities are in the hands of the king the church becomes void, the king shall present. 2 *Rol.* 344. l. 21.

Or,

Or, if the church becomes void after the death of the bishop, before seizure. 2 *Rol.* 344. l. 26.

Or, in the life of the bishop, &c. who does not collate in his lifetime. 2 *Rol.* 343. l. 30.

Tho' the king does not present, till the successor sues livery. 2 *Rol.* 343. l. 32.

Tho' by composition the presentation belongs to another, and not to the bishop; for the composition does not bind the king. 2 *Rol.* 343. l. 35.

Or, if the bishop collates *A.* in his lifetime, but dies before *A.* is inducted. *R. 11 H.* 4. 9. a.

But if a bishop presents, and his clerk is inducted in the morning; tho' he dies in the afternoon, the king shall not present.

So, if the successor be elected before the avoidance; tho' he be not consecrated, the king shall not have the presentation. 2 *Rol.* 343. l. 15.

So, if the king be patron of a church, united by the *ft.* 22 *Car.* 2. 11. to a church of which a subject is patron, and which is of greater value, (and therefore by the words of the statute shall have the first turn,) the king shall not have the first turn by his prerogative. *Sho.* 208.

So, if an incumbent be made a bishop, by which a church becomes void; tho' a subject be patron, the king shall present. *Bro. Presentment*, 14. *Cont. Dy.* 228. b. *Dub. Ow.* 144. *Cro. El.* 527. *R. acc. Mo.* 391. *Per two J. Hutton cont.* 1 *Cro.* 691. 2 *Rol.* 342. l. 25. *R. M.* 6 *W. & M. Ca. Parl.* 185. *Vau.* 19, 20. 3 *Lev.* 377. *Sho.* 457. 4 *Mod.* 200.

So, if an archdeacon be created bishop, the king shall present to the archdeaconry; and not the patron. *R.* 3 *Leo.* 151. 4 *Leo.* 61.

So, if he be created a bishop in Ireland. *Cro. El.* 790. 1 *Ver.* 419. *Dub.* 4 *Inst.* 356, 7. *Vide post.* (N 1.)

So, if one incumbent after another be created a bishop, the king shall present *toties quoties.* *R. M.* 6 *W. & M. B. R. between The King and Doctor Lancaster.* 3 *Lev.* 378. *Sho.* 441. 462. 501. 4 *Mod.* 200.

So, if the incumbent be created a bishop, and has a *commendam retinere*, which expires in the life of the bishop; the king shall present. *R. Ca. Parl.* 170. 185. 3 *Lev.* 378. *Sho.* 449. 463. 4 *Mod.* 200.

So, if the incumbent be created a bishop, the king shall present, tho' the patronage be established by act of parliament. *R. Ca. Parl.* 173. 185. 3 *Lev.* 382. *Sho.* 413. *Sal.* 540. 4 *Mod.* 200.

[It is not necessary that the king's presentation to a church vacant by promotion, should be in the lifetime of the promotee. *Rex v. Archbishop of Ardmagh*, *T.* 3 *G.* 2. *Str.* 837.

But the king shall not present where the incumbent of a donative is made a bishop. *Ca. Parl.* 184.

Nor, where a bishop elect has a *commendam retinere* for his life. *Ca. Parl.* 184. 2 *Rol.* 344. l. 5.

Nor, where an incumbent of an hospital is made a bishop. 2 *Rol.* 343. l. 15.

Or, a provender of a provendry. 2 *Rol.* 343. l. 10.

So, if the king does not present upon the next avoidance, he shall not present afterwards. *R. Cro. El.* 790.

So, if a patron be outlawed, when an avoidance happens, the king shall present. 1 *Leo.* 139. 201. *Mo.* 270.

Yet

Or, deprived for herefy, or other crime. 2 *Rol.* 347. l. 30.

But if a presentation be wholly void, it shall not serve for a turn; as, if *A.* be presented, instituted and inducted, and afterwards does not read the 39 articles; for which the *st.* 13 *El.* 12. makes the presentation, &c. void. 2 *Rol.* 347. l. 50. 5 *Co.* 102. b.

So, if after deprivation *A.* be presented, &c. and then the deprivation is reversed, and the first incumbent restored; the presentation of *A.* shall not serve the turn. *R.* 2 *Rol.* 347. l. 40. 5 *Co.* 102.

If the guardian of the youngest parcener within age marries the eldest, and afterwards presents in the name of both; this shall not serve the turn of the eldest. 2 *Rol.* 347. l. 20.

If a dispensation be granted, upon a cession, *tener in commendam*, and confirmed by the king; this does not serve the turn of the king. *R. Sal.* 541.

If *A.* and *B.* ought to present by turn, and *A.* usurps upon the turn of *B.*, he shall not lose his own turn. *Semb. F. g.* 250.

(H 5.) *Presentation by the king as patron.*] If the king be seised of an advowson, in which the church exceeds the value of 20 marks, he himself shall present. 38 *Ed.* 3. 3. b.

And if the chancellor presents, upon a supposition that it was under such value, and before induction the king presents, his presentee shall be admitted; or, being refused, shall have a *quare impedit*. 38 *Ed.* 3. 3. b.

But, after induction, such presentee of the chancellor shall not be removed. 2 *Rol.* 189. l. 5. *Hob.* 214.

Except, where the presentation by the chancellor takes notice, that it was under that value, when it is not so; for then the king is deceived. 2 *Rol.* 189. l. 10. *Hob.* 214.

But to a church of the crown, under the value of 20 marks, the chancellor shall present. 38 *Ed.* 3. 3. b.

Or, of 20 *l.* *Hob.* 214.

So, if a church belongs to an infant in ward of the king. *Mo.* 874. *Vide post.* (H 6.)

(H 6.) *By his prerogative.*] If the king's tenant of a manor dies, his heir within age, who is in ward to the king, and during the wardship a church of the ward becomes void, the king shall present. *Vide ante*, (H 5.)

Tho' the church becomes void before seizure of the ward.

So, if it was void in the life of the tenant, and continued void at his death, the king shall present.

Tho' the tenant presented in his lifetime, and there was institution upon it, but he died before induction.

Tho' the tenant died after a lapse to the bishop, but before his collation.

Tho' the king does not present till the heir sues livery.

Or, the church does not become void till tender of livery by the heir, if the livery be not sued.

So, if the king grants over the ward.

So, if an archbishop or bishop dies, and during the time that the temporalities are in the hands of the king the church becomes void, the king shall present. 2 *Rol.* 344. l. 21.

Or,

Or, if the church becomes void after the death of the bishop, before seizure. 2 *Rol.* 344. l. 26.

Or, in the life of the bishop, &c. who does not collate in his lifetime. 2 *Rol.* 343. l. 30.

Tho' the king does not present, till the successor sues livery. 2 *Rol.* 343. l. 32.

Tho' by composition the presentation belongs to another, and not to the bishop; for the composition does not bind the king. 2 *Rol.* 343. l. 35.

Or, if the bishop collates *A.* in his lifetime, but dies before *A.* is inducted. *R. 11 H.* 4. 9. a.

But if a bishop presents, and his clerk is inducted in the morning; tho' he dies in the afternoon, the king shall not present.

So, if the successor be elected before the avoidance; tho' he be not consecrated, the king shall not have the presentation. 2 *Rol.* 343. l. 15.

So, if the king be patron of a church, united by the *ff.* 22 *Car.* 2. 11. to a church of which a subject is patron, and which is of greater value, (and therefore by the words of the statute shall have the first turn,) the king shall not have the first turn by his prerogative. *Sbo.* 208.

So, if an incumbent be made a bishop, by which a church becomes void; tho' a subject be patron, the king shall present. *Bro. Presentment*, 14. *Cont. Dy.* 228. b. *Dub. Ow.* 144. *Cro. El.* 527. *R. acc. Mo.* 391. *Per two J. Hutton cont.* 1 *Cro.* 691. 2 *Rol.* 342. l. 25. *R. M.* 6 *W. & M. Ca. Parl.* 185. *Vau.* 19, 20. 3 *Lev.* 377. *Sbo.* 457. 4 *Mod.* 200.

So, if an archdeacon be created bishop, the king shall present to the archdeaconry; and not the patron. *R.* 3 *Leo.* 151. 4 *Leo.* 61.

So, if he be created a bishop in Ireland. *Cro. El.* 790. 1 *Ver.* 419. *Dub.* 4 *Inst.* 356, 7. *Vide post.* (N 1.)

So, if one incumbent after another be created a bishop, the king shall present *toties quoties*. *R. M.* 6 *W. & M. B. R. between The King and Doctor Lancaster.* 3 *Lev.* 378. *Sbo.* 441. 462. 501. 4 *Mod.* 200.

So, if the incumbent be created a bishop, and has a *commendam retinere*, which expires in the life of the bishop; the king shall present. *R. Ca. Parl.* 170. 185. 3 *Lev.* 378. *Sbo.* 449. 463. 4 *Mod.* 200.

So, if the incumbent be created a bishop, the king shall present, tho' the patronage be established by act of parliament. *R. Ca. Parl.* 173. 185. 3 *Lev.* 382. *Sbo.* 413. *Sal.* 540. 4 *Mod.* 200.

[It is not necessary that the king's presentation to a church vacant by promotion, should be in the lifetime of the promotee. *Rex v. Archbishop of Ardmagh*, T. 3 G. 2. *Str.* 837.

But the king shall not present where the incumbent of a donative is made a bishop. *Ca. Parl.* 184.

Nor, where a bishop elect has a *commendam retinere* for his life. *Ca. Parl.* 184. 2 *Rol.* 344. l. 5.

Nor, where an incumbent of an hospital is made a bishop. 2 *Rol.* 343. l. 15.

Or, a provender of a provendry. 2 *Rol.* 343. l. 10.

So, if the king does not present upon the next avoidance, he shall not present afterwards. *R. Cro. El.* 790.

So, if a patron be outlawed, when an avoidance happens, the king shall present, 1 *Leo.* 139. 201. *Mo.* 270.

Yet

Yet upon reversal of the outlawry, the patron shall be restored; and upon recovery in a *quare impedit*, he shall have a writ to the bishop. *R. Mo.* 270. *Cro. El.* 44.

So, if *A.* be outlawed, and a church appendant to a manor, which the king has in his possession by the outlawry, afterwards becomes void, and the king presents, &c.; the incumbent shall not be removed, tho' the outlawry be reversed. *R. Mo.* 270.

(H 7.) How a Presentation by a Common Person shall be made.

If a common person presents, he ought to shew how the church became void, by death, cession, resignation, or deprivation.

A presentation may be by *parol*, as well as by writing. *Co. L.* 120. *a.* 1 *Brownl.* 162.

And, if it be by writing sealed, it is not a deed; but in nature of a letter of recommendation of the clerk to the bishop. *Co. L.* 120. *a.*

If a patron presents one, who is instituted, but dies before induction, yet the patron cannot present *de novo*. 9 *Co.* 132. *a.*

But if a patron writes and seals a presentation, and the clerk without his privity or consent obtains it, and is instituted and inducted upon it, it shall be void. *Rel.* 7.

(H 8.) How a Presentation by the King shall be made.

So, regularly, a presentation by the king ought to shew by what title he presents.

And if he mistakes his title, the presentation is void; for the king was deceived; as, if he presents, *ratione lapsus*, where he was very patron. *R.* 6 *Co.* 29. *b.* *Adm. Cro. Car.* 99. 592. *Vau.* 14.

Otherwise, if he presents generally, without saying, by what title. 1 *Mod.* 254.

So, the king shall present upon an avoidance in the time of his predecessor, and not the executor or administrator of the deceased king.

Tho' the *st.* 25 *Ed.* 3. *de Clero.* 1. says, he or his heirs shall not present to a benefice of the time of his progenitors, &c.; for this extends only to the progenitors of *Ed.* 3. as appears by the saving. 11 *H.* 4. 7. *R. Cro. Car.* 355. *Jon.* 338.

So, the king may present by *parol*. *Co. L.* 120. *a.* *Mo.* 874. 2 *Cro.* 248.

If the bishop be present. 1 *Brownl.* 162.

But the usual way is to make a presentation by instrument under the great seal.

Or, if it be under the privy seal, it is sufficient. *Per two J.* 2 *Cro.* 248.

So, if he presented to a church in right of a ward, under the great seal, or seal of the court of ward, it is good; for it is not material which seal. *R. Cro. Car.* 99. 1 *Brownl.* 162.

Yet, by the *st.* 3 *H.* 7. (not printed,) all grants, &c. of lands, advowsons, &c. parcel of the duchy of *Lancaster*, are void, if they be not under the duchy seal. — And therefore, a presentation, under another seal, to a church within the duchy, is void. *R. cont. Mo.* 874. 2 *Rel.* 182. *l.* 15. 1 *Brownl.* 162. *D. cont.* 1 *Leo.* 227. *Vide Patent*, (C 4.)

So, a presentation under the seal of the court of wards, where the king has not the church in right of a ward, is void. *R. Cro. Car.* 100. So,

So, a presentation under the Exchequer-seal, is void. 2 *Cro.* 248.
 If the king presents a clerk, who dies before induction, he shall present *de novo*; for his presentation ought to have complete effect.
R. 9 Co. 132. *a.*

(H 9.) Within what Time a Presentation shall be made.

Every common person ought to present within six months after the avoidance, if the church becomes void by the death of the incumbent; otherwise, the presentation lapses to the bishop. 3 *Leo.* 46. 2 *Rol.* 363. *l.* 25.

Tho' the patron presents, and his clerk is refused for inability. *R. Dy.* 327. *b.* *R. 4 Mod.* 140. *Ca. Parl.* 103. *Bend. pl.* 136. 3 *Leo.* 46. 2 *Rol.* 364. *l.* 20. *Vide post.* (H 11, &c.—N 1, 2.)

So, if a church becomes void by statute; as, by acceptance of a plurality; for the patron ought to take notice at his peril. *R. Dy.* 237. *a.* 2 *Inst.* 632. *R. Cro. Car.* 357. *Jon.* 338.

By certificate of the bishop for non-payment of tenths according to the *st.* 26 *H.* 8. 3. *R. Dal.* 59.

So, if a church becomes void by cession. *Jon.* 337.

And the six months shall be reckoned by the calendar, viz. 182 days. *Dy.* 327. *b.* in marg. *Vide Ann.* (B).

But, if an avoidance be by resignation, or deprivation, the six months do not commence till notice of the avoidance given by the ordinary to the patron. *Dy.* 327. *b.* *Dal.* 51. 59. *R. Bend. pl.* 234. *Dy.* 293. 3 *Leo.* 46. *Vide post.* (N 11.)

Tho' the patron was party to the suit, in which he was deprived. *R. 6 Co.* 29.

Tho' notice be given by other than the ordinary; for the ordinary himself ought to give express notice, that he was deprived for such a cause, and that thereby the church became void, and it belongs to him to present. *R. 6 Co.* 29. *b.*

Tho' the bishop dies, the lapse does not incur to his successor before notice. 2 *Rol.* 365. *l.* 20.

Tho' the temporalities are in the king's hands; for the guardian of the spiritualities ought to give notice. 2 *Rol.* 365. *l.* 26.

So, by the *st.* 13 *El.* 12. if the presentee does not read the 39 articles, by which the church is *ipso facto* void, without a declaratory sentence; yet it is provided that no lapse commence till notice. *R. 6 Co.* 29. *b.* *Dy.* 369. *b.*

(H 10.) When it may be revoked.

If the king makes a presentation, he may afterwards revoke it, and present another. *Adm.* 38 *Ed.* 3. 3. 2 *Rol.* 188. *l.* 40.

And this, at any time before induction, tho' the clerk be instituted, and a letter sent to the archdeacon to induct him. *Bro. Qu. Imp.* 1. 10. 65.

If the king revokes a former, and makes a second presentation; the former is void, without notice to the ordinary. *Dy.* 327. 2 *Rol.* 188. *l.* 52.

So, a lay-patron, before institution, may vary his presentation, and present another; upon which the bishop may admit the one or the other. *Latch,* 191. 253.

Or,

Or, may revoke the former presentation before admission. *Per Dod. Latch*, 192. 254. 2 *Rol.* 349. l. 7.

So, a patroness, tho' a spiritual person, as an abbess, might vary her presentation; for she is not more apprised than a lay-patron of the sufficiency of her clerk. *Kel.* 154. a.

But if the king makes a second presentation; without mention or revocation of the former, it shall be void. *Semb. Cro. Car.* 100. 2 *Rol.* 188. l. 40. *Dy.* 339. b.

But *R. cont.* for the first presentee had not any estate or interest in the church. 2 *Rol.* 190. l. 30.

If the second presentation, without mention of the former, be after institution upon the former, it shall be void. *R. Dy.* 339. b. in marg. *Per three J.* 2 *Cro.* 248.

So, if the second presentation be obtained by covin, or by deceit to the king. *R. Dy.* 339. b. *Bend. pl.* 279.

Otherwise, if the second presentation be obtained without covin, and before admission and institution upon the former. *R. Dy.* 339. b. in marg.

So, a spiritual patron cannot revoke or vary his presentation; for he shall be intended consant of the sufficiency of his former clerk. *R. Kel.* 154. a. *Acc. per two J. Whitl. cont. Latch*, 191. 253.

(H 11.) Presentation by Lapse.

(H 11.) *To the bishop, and archbishop.*] If a patron does not present within six months after avoidance, (where he ought to take notice of it, or after notice, when the ordinary ought to give notice,) the church lapses to the bishop, and he shall present by lapse. 2 *Inst.* 273. *Vide ante*, (H 9.)

And this seems to be by a canon in the council of *Lateran.* 2 *Rol.* 362. O.

[Lapse shall incur from the time of institution into a second benefice, against the patron, if notice be given him; otherwise, not. *Semb. per C. B. Wolferstan v. Bishop of Lincoln*, T. 3 G. 3. 2 *Wilf.* 174.]

[Lapse shall incur from the time of induction, without notice. *Ibid.*]

[Lapse only incurs from the induction to second benefice. *Per B. R. T.* 4 G. 3. 3 *B. M.* 1504.]

If the bishop does not present within six months after the lapse to him, then the church lapses to the archbishop.

And a lapse incurs, tho' the patron be an infant. 3 *Leo.* 46.

Or, out of the realm. *Wat.* 1.

So, a lapse incurs if no clerk was presented, tho' the patron brings a *quare impedit* against the bishop and others. *Per Hob.* 200.

Tho' the patron recovers in a *quare impedit*, if the bishop be not a party, and no writ comes to the bishop within six months. 2 *Rol.* 366. l. 5.

But the bishop, or the king, cannot grant the benefit of the lapse to another. 2 *Rol.* 187. l. 32. *Hob.* 154.

If a bishop dies after a lapse incurred, his executor or administrator shall not present, but the king; for it is a trust, and not an interest. *Hob.* 154.

(H 12.) *To the king.*] So, if the bishop does not present, nor the archbishop

archbishop within six months after a lapse to him, the church lapses to the king.

And, upon a lapse to the king, he is not confined to any time; for the *st. 25 Ed. 3. 1.* does not extend to presentations to be thereafter made. *R. Cro. Car. 355. Jon. 337.*

So, the king's successor may present upon a lapse to his predecessor. *R. Cro. Car. 355. Jon. 337. 11 H. 4. 7.*

So, if a bishop does not collate to a dignity, prebend, &c. a lapse incurs to the king.

So, if he does not collate, where the avoidance is by acceptance of another benefice, and the former is in his own diocese, a lapse incurs before deprivation.

(H 13.) *When there shall be no benefit of a lapse.*] But if a *quare impedit* be brought against a bishop, upon refusal of a clerk, tho' six months pass *pendente lite*, there shall be no lapse to the bishop. *Co. L. 344. b.*

So, in every case, where a *quare impedit* is brought within six months, no lapse incurs to the bishop, if he be made a party to the writ. *Co. L. 344. b. R. 6 Co. 52. a. 2 Cro. 93. Hob. 320.*

Nor, in such case, shall there be a lapse to the archbishop, or the king; for where there is not a lapse to the bishop, it shall never be to the archbishop, or the king. *Co. L. 344. b. 345. a. R. 6 Co. 52. a. 2. Cro. 93. 2 Rol. 365. l. 21.*

So, no lapse incurs, where the king is patron, tho' he does not present within six months, or afterwards. *2 Inst. 273.*

So, after a lapse, if the patron presents before the bishop or archbishop collates, his clerk shall be instituted. *R. Hut. 24. Hob. 152. 4. 2 Inst. 273.*

So, after a lapse to the king, if the patron presents before the king takes advantage, and his clerk is admitted, instituted, and inducted, and dies incumbent, the king shall not present by lapse; for lapse is only *unica & proximâ vice*. *R. Ow. 2. Mod. 224. 269. Cro. El. 44. Adm. Ow. 5. Mo. 259. Cro. El. 119. R. 7 Co. 28. Adm. 2 Cro. 216. Lut. 1086. Qu. Dy. 277. a.*

So, if a clerk presented by a patron after a lapse to the king resigns, without covin. *2 Cro. 216.*

But after a lapse to the king; tho' the patron presents before the king takes advantage, and his clerk is instituted and inducted, the king may present *quamdiu* the presentee of the patron continues incumbent. *R. 2 Cro. 216. Dub. Hob. 154.*

Tho' such presentee afterwards resigns, by covin. *2 Cro. 216. 1 Brownl. 161.*

So, if he be deprived. *Adm. Ow. 5. Mo. 259. Cro. El. 119.*

So, if he does any act by which the church becomes void; as, for not paying his tenths. *R. Ow. 5. Mo. 259. Cro. El. 119.*

So, if the bishop, after a lapse to him, collates, and the patron presents before induction, the bishop may refuse his clerk. *Dy. 277. a.*

(H 14.) Presentation by Usurpation.

(H 14.) *What shall be.*] If a man presents to a church without title, this usurpation makes as it were a *disseisin*, which puts the right-
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ful patron out of possession, and, by the common law, gains the advowson to the usurper for ever, if it be not recovered by right of advowson. *Co. L. 344. b. R. 6 Co. 49.*

And, after usurpation, the rightful patron cannot grant the advowson to another, till recovery.

And, by the common law, an usurpation upon an infant, *feme-covert*, &c. puts them to their right of advowson. *R. 6 Co. 49.*

So, the king may make usurpation by his presentation; for the induction creates the wrong. *Per three J. Windh. cont. 1 Sid. 163.*

So, collation without title puts him, who has right to collate, out of possession. *6 Co. 30. a. Co. L. 344. b. 6 Co. 50. a.*

So, the king shall be put out of possession of the next avoidance, by an usurpation upon him. *1 And. 81. Vide post. (H 15.)*

(H 15.) *What not.*] But if a presentation be void, tho' the clerk be instituted, and inducted upon it, it is not an usurpation, nor shall the rightful patron be thereby out of possession, nor need he have a *quare impedit* to remove such incumbent; as, if the king presents upon a mistaken title. *R. 6 Co. 29. b. Vau. 14. Vide post. (M).*

Or, if institution and induction be upon a presentation by the king, which was revoked. *6 Co. 29. b.*

Or, the bishop collates before six months elapse. *R. 6 Co. 29. b.;* for the church is not full without a presentation, or lawful collation. *Co. L. 344. b. Hob. 316.*

So, no collation without title puts him who has a right to present out of possession. *6 Co. 30. a. 50. a. Per two J. Dal. 59.*

So, a collation by title does not put him who has a right to present out of possession. *R. 1 Leo. 226. Cro. El. 240.*

So, a recovery in a *quare impedit* against a clerk, whom the king presented by usurpation, avoids the usurpation. *R. 1 Mod. 255.*

So, since the *st. 1 El.*, an usurpation upon a bishop, or other ecclesiastical person, tho' it puts him out of possession, does not bind his successor, who shall have a *quare impedit*, or present, as if no usurpation had been made. *R. Jon. 46.*

So, usurpation upon an infant does not bar him, but he may continue by presentation or *quare impedit*. *Jon. 46.*

So, by usurpation upon the king, he shall not be put out of the inheritance of an advowson. *6 Co. 49. b. Co. L. 344. b. R. 1 Brownl. 166. R. Dal. 75. R. 1 And. 81. Per two J. Cro. El. 519. Vide ante, (H 4.)*

Yet he shall lose the presentation *hac vice*, if he does not recover it by *quare impedit*. *6 Co. 49. b. 2 Cro. 54. 123.*

And if he confirms the estate of the presentee, it shall be good. *1 Brownl. 166.*

So, by 20 usurpations upon the king, he shall not be put out of possession of the advowson, but shall maintain a *quare impedit* upon the next avoidance. *R. and judgment cont. reversed. 2 Cro. 53. 123. 2 Rol. 371. l. 45. R. Cro. El. 240. 1 Leo. 226. R. cont. Godb. 7.*

Tho' the king be seised in right of the duchy of Lancaster. *R. Cro. El. 240. 1 Leo. 226.*

So, after an usurpation, a patron may recover, by right of advowson by the common law, tho' he loses the present presentation for ever. *Co. L. 344. b.* So,

So, by the *fl. W. 2. 5.* may those entitled in reversion after the death of a tenant in dower, by the curtesy, for life, or for years, or in tail, or an heir of full age, who has been in ward, where the usurpation was during the particular estate, or during the wardship.

So, by the *same statute*, women discover, where the usurpation was during their coverture.

Ecclesiastical persons, where it was during the vacancy.

But till recovery he continues out of possession, and a grant of the advowson by him is void. *Jon. 46.*

So, till recovery, or presentation by an infant, or the successor of a bishop. *Jon. 46.*

So, by the *fl. 7 An. 18.* no usurpation, &c. shall displace the estate or interest of any entitled to an advowson, or turn it to a right; but such person so entitled may present or have a *quare impedit* on the next or any subsequent avoidance, as if no usurpation had been,

(I) Admission and Institution; how made, &c.

WHEN a patron presents his clerk to the ordinary, he, upon examination, if he finds him qualified, ought to admit him; and thereupon he says, *admitto te habilem.* *Co. L. 344. a.*

And afterwards, *instituo te rectorem talis ecclesie, accipe curam tuam & meam.* *Co. L. 344. a.*

But admission and institution are taken the one for the other. *Co. L. 344. a.*

The institution by the ordinary was introduced *circa tempus R. 1. & John*; before which the incumbent took his church by investiture of the patron. *Seld. de Dec. 86. 375. 383.*

The ordinary ought to make institution in a convenient time after the presentation tendered to him.

By the *canon, 1 Jac. 95.* the space of two months, which by former constitutions bishops had to inquire of the sufficiencies and qualities of ministers presented, is reduced to 28 days. And within the 28 days the bishop shall not institute any other to the prejudice of the party before presented, *sub pena nullitatis.*

Institution may be made by the bishop out of his diocese; and by any seal. *R. Jon. 331.*

And tho' made after *caveat*, without hearing of the party, it shall not be void. *R. 1 Rol. 227.*

If a patron presents after a lapse to the archbishop, and before collation by him, he may present to the bishop. *2 Rol. 348. l. 50.*

After institution, the bishop sends letters to the archdeacon to make induction. *Vide post. (L).*

But the ordinary may refuse a clerk presented to him, if he be *minus idoneus*, as, if he be a villein, a bastard, outlawed, excommunicated, or within age. *2 Inst. 632.*

Or, *merè laicus.* *2 Inst. 632. 5 Co. 58. a.*

So, if he be *criminosus*; as a heretic, or schismatic, &c. *2 Inst. 632. R. Dal. 51.*

Or, a manslayer, felon, &c. *5 Co. 58.*

Or, guilty of any offence, for which he ought to be deprived. *R. 5 Co. 58. a.*

So, if he be illiterate. *2 Inst. 362. Ca. Parl. 31.*

Tho' he was before admitted to orders, and a benefice. *Ca. Parl.* 90. *Sal.* 539.

So, if the benefice be in *Wales*, and the clerk does not understand *Welsh*. *R. Cro. El.* 119. 1 *Leo.* 31.

So, if he be not in orders, and gives no reasonable proof that he is. 1 *Leo.* 230.

If he be an alien. 3 *Inst.* 338.

The examination of a clerk belongs to the ordinary as a judge, and not as a minister. 2 *Inst.* 632.

After refusal, the ordinary ought to give notice of it to the patron, if he be refused for any cause which belongs to the consufance of the ecclesiastical law; as, for heresy, schism, illiterature, &c. 2 *Inst.* 632. 4 *Mod.* 140. *Sal.* 539.

And the notice ought to be personal by letters from the bishop to the patron; for notice fixed to the door of the same church is not sufficient. *Dy.* 327. *b.* *Cro. El.* 119. *Vide infra.* *Vide post.* (N 11.)

Tho' he had personal notice before of the refusal of a former presentee, and the patron still continues in the same county. *Dy.* 328. *a.*

So, notice ought to be given in a convenient time. *R.* 4 *Mod.* 140. *Ca. Parl.* 103. *Sal.* 539. *R.* 1 *Leo.* 32. *Cro. El.* 119.

But there needs no notice to the patron, where he is refused for a temporal crime; as manslaughter, &c. 2 *Inst.* 632. 3 *Leo.* 47. *Adm. Sal.* 539.

Or, for a disability incurred by act of parliament, if the act does not oblige notice to be given. 2 *Inst.* 632.

So, notice upon the door of the church is sufficient, where the patron is out of the county. *Cro. El.* 119. 1 *Leo.* 32. *Vide supra.*

Yet the cause of refusal is traversable; and if it be a spiritual matter, and the clerk is living, it shall be tried by the metropolitan. 2 *Inst.* 632. 5 *Co.* 58. *a.*

If the cause of refusal be a temporal matter, or a spiritual matter when the party is dead, it shall be tried by the country 5 *Co.* 58. *a.* 2 *Inst.* 632.

And therefore, if a patron brings a *quare impedit* against the bishop upon refusal of his clerk, the plea of the bishop ought to shew a certain and particular cause of refusal; for it is not sufficient to say, generally, *quod non fuit idoneus*, or *quod fuit criminofus*, &c. *R.* 5 *Co.* 58.

Or, that he was a haunter of taverns, *ob quod & alia crimina*, &c. 5 *Co.* 58. *a.* *Mar. pl.* 11.

That he was a schismatic, without shewing how. *R.* 5 *Co.* 58. 3 *Leo.* 200.

But, *quod fuit minus fufficiens in literaturâ, & eâ ratione inhabilis*, is sufficient; for it is in the negative, and does not consist of a single instance, but general ignorance. *R. cont. in C.B. and aff. in B.R. but afterwards reversed in parliament*, 4 *Mod.* 135. *Ca. Parl.* 92. 3 *Lev.* 314. *Sal.* 539.

So, it shall not be a cause for refusal, that he does not produce his letters of orders; for perhaps they are lost. 1 *Leo.* 230. *Cro. El.* 241. 2.

That he had not any letters testimonial. 1 *Leo.* 230.

'(K) Jure Patronatus.

(K 1.) How it shall be awarded.

SO, if two present to the bishop, he may have a *jure patronatus* before he institutes the clerk of either of them; and upon that a commission goes under the bishop's seal, to his chancellor and others, who make a mandate to an officer to summon twelve or more, one moiety clerks, the other laymen.

The jury ought to inquire, 1. Whether the church be void, and how; 2. Who presented last; 3. Who is the rightful patron; 4. Who ought now to present; 5. Whether the clerk be *idoneus*.

(K 2.) When necessary.

A *jure patronatus* may be awarded whenever a church is litigious: as, if two patrons present several persons to the same church. *Hob.* 317.

Or, the same person; for the admittance of the clerk of one puts the other out of possession.

So, if the bishop suspects the title of the patron, he may award a *jure patronatus* tho' the church be not litigious. *Hob.* 318.

As, where lapse does not incur before notice, to ascertain the very patron. *Hob.* 318.

So, if there be a verdict in a *jure patronatus* for the one patron, and afterwards he presents his clerk; and before his admittance, the other presents; the bishop may award a new *jure patronatus*.

So, if either party requires a *jure patronatus*, the bishop ought to award it; otherwise he will be a disturber.

(K 3.) When not.

But the bishop need not award a *jure patronatus*, except at the prayer and costs of one, or both parties. *R. 2 Leo.* 168.

So, he may admit at his peril the clerk of either patron, tho' the church be litigious, without a *jure patronatus*; but he will be a disturber thereby, if the patron of the clerk admitted does not appear to have title. *2 Leo.* 168. *1 Rol.* 227.

If he admits the clerk of one patron without a *jure patronatus* before the other presents, he shall not be a disturber; tho' the first patron afterwards does not appear to have title.

So, if a *jure patronatus* be granted, he may admit the clerk of the one *pendente lite*, upon peril that he be a disturber, if he has not the right. *R. 2 Leo.* 168.

And if a suit be in the spiritual court for such admission *pendente lite*, a prohibition goes. *R. 2 Leo.* 168.

The verdict in a *jure patronatus* does not bind the right of the patron, for it is only an inquest of office. *Hob.* 317.

So, it does not bind the bishop; for he may admit the clerk of the other patron contrary to the verdict in a *jure patronatus*, if he will. *Hob.* 317.

But it will be at his peril; for he will be a disturber, if the patron of the clerk admitted has no title. *Hob.* 317.

And the patron, for whom the verdict was in the *jure patronatus*, shall have an action upon the case for his damage and expence in suing

a *quare impedit*, if he does not make the bishop a party to the suit. *Hob.* 318.

But a verdict in a *jure patronatus* binds all; that the bishop shall not be a disturber, if he admits the clerk, for whom the verdict is found, tho' the other patron afterwards recovers. *Hob.* 317.

(L) Induction; by whom it shall be made.

AFTER institution the bishop makes a mandate to the archdeacon to make induction; before which the clerk is not complete incumbent.

Or, the bishop may give his mandate to other than the archdeacon, if he pleases.

Or, by prescription or composition, another may claim a right to make induction. 11 *H.* 4. 9.

The archdeacon need not make induction in person, but may give authority to another clerk within his jurisdiction to make it.

Or, he may direct his precept *omnibus & singulis rector. vicar. cleric. & literat. infra archidiaconat. meum, &c.*

So, if it be by a clerk out of his archdeaconry, it will be good.

If the bishop dies after a mandate to the archdeacon and before induction, yet he may afterwards induct. *R. cont. but the judgment afterwards reversed.* 1 *Vent.* 309. 319. 2 *Jon.* 78.

But if the guardian of the spiritualties institutes, and makes a mandate for induction and before induction made, a new bishop is consecrated; the mandate becomes void. *R.* 2 *Lev.* 199.

If the archdeacon refuses induction, he may be sued in the spiritual court.

Or, an action upon the case lies against him. 1 *Vent.* 309. *F.N.B.* 47. *H.*

And the bishop cannot revoke his mandate. 1 *Vent.* 309.

So, a prohibition of the execution of the mandate cannot be made by the king. 1 *Vent.* 309.

Before induction the clerk has not seisin of the possessions of the church. 2 *Inst.* 358.

Nor, can he grant.

Or, sue for tithes.

(M) When a Church shall be full.

A Church is full, as against a common person, by admission and institution, before induction: and therefore, after institution, the rightful patron cannot present; but ought to have his *quare impedit*. 2 *Rel.* 349. l. 25. 2 *Inst.* 358.

And therefore, in a *quare impedit* by the king, or him who makes title by the king, it is sufficient to allege a presentation, upon which the clerk was admitted, and instituted, without saying, inducted. *R. Bend. pl.* 297. *Vide Pleader*, (3 I 5.)

And if *A.* be presented, and instituted, and afterwards *B.* is presented, instituted, and inducted, it shall be void. 3 *Sal.* 195.

So, by admission, institution, and induction, the church is full against the king; for he cannot present another, tho' he has right; but ought to have his *quare impedit*. 2 *Rel.* 349. l. 45. 2 *Inst.* 358.

So,

So, he cannot present the same clerk, who is presented by usurpation; for it does not amount to a surrender and new presentation.
2 *Rol.* 349. l. 51.

So, he cannot present a clerk before presented, *ad corroborandum*, but ought to make an express grant. 1 *Sal.* 162.

By admission, institution, and induction, a church shall be full, tho' the presentee was *merè laicus*. *R. Dy.* 293.

But, if a bishop collates within six months, or before notice to the patron, where notice is necessary, &c. tho' a lapse to the metropolitan be thereby prevented, the church is not full by such unlawful collation: but the patron may present without a *quare impedit*. *Vide ante*, (H 15.)

So, if the king presents *ratione lapsus*, &c. where he mistakes his title, tho' there be institution and induction upon it; for the king is deceived, and the presentation being void, institution upon it is in the nature of a collation. *R. 6 Co.* 29. b. *R. Hob.* 302.

Yet, as to all but the rightful patron, he is incumbent; for he shall sue for tithes, may take a confirmation from the king, &c. *Hob.* 302.

(N) When a Church becomes void.

(N 1.) By Death, or Cession.

A Church becomes void by the death of the incumbent, which is the act of God; or, by cession or resignation, which are the acts of the party; or, by act of law, as simony, non-residence, deprivation, &c.

If an incumbent dies, his benefice becomes void, and the patron without notice ought to present within six months. *Vide ante*, (H 9. 11, &c.)

So, if the incumbent makes a cession; as, if he be created a bishop, all his ecclesiastical benefices becomes void, without a dispensation *retinere in commendam*. 11 *H.* 4. 7. 37. 60. *Vide ante*, (H 6.)

Tho' it be a benefice in another diocese.

Or, another kingdom under the dominion of the king.

Tho' it be a benefice *sine curâ*, as well as *cum curâ animarum*.

If he be made a bishop of Ireland. *Pal.* 345. 349. *Vide ante*, (H 6.)

If he be created bishop of the *Isle of Man*. *Pal.* 345.

If a bishop were made a cardinal. 4 *Inst.* 357.

And it shall be void without a declaratory sentence. *Jon.* 337.

But a benefice is not void by acceptance of a bishopric, till consecration.

Nor, if he be only a tutular bishop.

Or, a suffragan bishop.

Or, a bishop in *Italy*, or other foreign kingdom. *Pal.* 349.

(N 2.) By Resignation.

So, if an incumbent resigns his church, by proper words, to his ordinary, who accepts it, the church is void.

So, two by the same writing, may agree to exchange their churches,
S f 4 and

and with such intent to resign them to the ordinary; and if such exchange be completed in the life of the parties, it shall be good.

And such resignation ought to be by proper words; as, *renuncio, cedo, dimitto, &c.*

So, if a man gives, grants, renders, and confirms to the ordinary a prebend, it shall be good.

If a man makes a resignation of a church to the bishop of the diocese, it shall be good, generally.

Or, of a donative to the patron.

Or, to the patron and a stranger; for as to the stranger it is void.

If he makes a resignation of a deanry, prebend, &c. of the king's donation, to the king, it shall be good.

A resignation to him, who is not the proper ordinary nor can make institution, is void.

So, a resignation shall be void, if it be upon condition to present such an one: for it ought to be made *spontè, purè, & simpliciter*.

So, a resignation till acceptance by the bishop is not valid, and a presentation by the king before is void. *R. 2 Cro. 197.*

(N 3.) By Simony.

So, the *st. 31 El. 6.* if any, for reward, promise, &c. directly or indirectly present, collate, &c. to any benefice or ecclesiastical promotion, such presentation and the admission, &c. thereon shall be void, and the queen shall present for that one turn only; and any person who shall give or take any such money, promise, &c. shall forfeit two years profits of such benefice; and any person corruptly taking such benefice shall be disabled for ever to have the same benefice.

And if any, for money, (other than lawful fees,) promise, &c. directly or indirectly institute, induct, &c. any to any benefice, &c. he shall forfeit two years profits, and the benefice shall be void, and the patron present, &c.

Simony is *voluntas emendi, vel vendendi spiritualia, aut spiritualibus annexa.* *Cro. El. 789.*

As, if a bishop takes above the fees allowed, for granting orders, institution, &c. *R. Carth. 485.*

By the canon law, it was a cause for deprivation.

And a church shall be void by the *st. 31 Ed. 6.* if the clerk makes a gift, promise, &c. of any benefit to the patron: as, if he agrees to make a lease to the patron of his tithes, for such a rent.

If he agrees with the patron for so much for the next avoidance, when the incumbent is sick. *Cont. per three J. and acc. Cro. El. 686. Mo. 916. R. acc. Win. 63.*

If he agrees for 90 *l.* with the patron to present him when the church becomes void, and for security takes a grant of the next avoidance to *B.* in trust. *R. 1 Brownl. 164.*

If after an avoidance and *quare impedit*, by a mortgagee upon the presentation of a stranger, the heir of the mortgagor has a decree in equity for redemption, and that he shall recover the presentation in the name of the mortgagee, and then he articles for sale of the advowson to *A.*, and that he shall present such person as *A.* shall name, who names *B.*, and this was with intent that *B.* should be presented; it is simony. *R. 3 Lev. 116.*

So,

So, if *A.* agrees for money to resign, or to make another his curate.
R. Carth. 485.

So, if the father or friend of a clerk makes a simoniacal contract with the patron, or with his wife, or friend, without his privity; tho' the clerk is not privy to the contract, the church shall be void.

1 Brownl. 165. R. 3 Lev. 337. Lut. 1090. 1093.

Or, makes a promise without the privity of the clerk, that he shall make a lease of his tithes to the patron which the clerk afterwards does.

So, if a man presents by usurpation, upon a simoniacal contract.
3 Inst. 153.

So, by the *st. 12 An. 12.* if any after 29th September 1714, for money promise, &c. directly or indirectly take, procure, or accept the next avoidance in his own or another's name, and be presented or collated thereon, the presentation, &c. shall be void and the contract simoniacal, and the queen present or collate for that turn.

If a church be void every one may take advantage of it: as, a parishioner in a suit against him for tithes. [*Hob. 168. 5 T.R. 5.*]

If the patron be privy to the simoniacal contract, he shall lose the profits of the benefice for two years, and the king shall have the presentation *pro hac vice.*

And the computation of the profits shall be according to the real value; not according to the valuation 26 *H. 8. 3 Inst. 154.*

So, tho' the patron be not privy to it, the king shall have the presentation. *Semb. Lut. 1087.*

And the church continues void, tho' the simony be pardoned by parliament. *R. Cro. El. 686.*

And the king shall present, tho' the incumbent, presented by simony, dies; for *nullum tempus occurrit regi.* *R. 1 Brownl. 164.*

So, if a clerk, presented by simony, be privy to the contract, he shall be disabled to be presented by the king or otherwise, for ever. (*Vide 3 Inst. 153, 4.*)

[A person privy to a simoniacal contract is only disabled from being presented to that benefice, which was the object of the contract; but this disability extends no farther, and he still remains eligible to any other benefice. *1 Rol. Rep. 237. 3 Bulst. 91. Hob. 75. Cro. Jac. 386.*]

[Absolute disability is the punishment of simony by the canon law. *3 Burn's E. L. 347.*]

And the king cannot dispense with such disability. *3 Inst. 154.*

But where the clerk was not privy, tho' the church be void, he shall not be disabled to be afterwards presented. *3 Inst. 154.*

So, if *A.* presents upon simony by usurpation; the king shall not have the presentation, but the rightful patron. *3 Inst. 153.*

So, if a person presented by the king to a church, contracts with *B.*, presented by another patron, that he will not pursue his presentation; it is not a simoniacal contract. *Dub. 2 Rol. 464.*

So, it will not be a simoniacal contract, if a father contracts for the next avoidance for his son, without his privity. *R. Mo. 916.*

If one gives a bond to resign upon request. *R. Ray. 175. 1 Sid. 387. R. 2 Cro. 248. 274. R. Cro. Car. 180. Hut. 111. Jon. 220.*

[*Quere*, Has not the case of *Ffytche v. Bp. of London* altered the law upon this subject? *Cun. Law of Sim. p. 52.*]

[The

[The court will not let the validity of a bond of resignation be argued; they (even general ones) have been so often established, and even in a court of equity. *Peele v. Com. Carlisl, M. G. Str.* 227.]

Yet if a wrong use be made of such bond; it may be averred to be made for such purpose, and then it will be void. *R. Mo: 641. Acc. Cro. Car.* 180.

So, *Chancery* will stay a suit upon it, if a corrupt use be made of it. *1 Ver.* 411. 2.

[In an action for use and occupation of the glebe lands, the defendant cannot give evidence of a simoniacal presentation of the plaintiff, for the purpose of impeaching his title. *Cooke v. Loxley, B. R. M.* 33 *Geo.* 3. 5 *T. R.* 4.]

(N 4.) By Non-residence.

By the canon law, every one, who had *curam animarum* was bound to perpetual residence. *St. Eccl. Cases*, 27.

By *can. Step. arch. in concilio Oxon. episcopi in ecclesiis cathedral. residere procurant in majoribus festis, &c.* *Lind.* 131.

By another *can. ibid. episcopus nullum ad vicariam admittat nisi velit personaliter ministrare, & si non sit ultra 5 marcas, nisi resideat, &c.*

Et residere debet cum effectu, viz. continue in beneficio morari. *Lind.* 131.

By *can. Othon.* 1236. *ad vicariam nullus admittatur, nisi juret residentiam facere, & eam faciat continue.* *Const. Oth.* 26, 27.

So, non-residence has been often condemned in parliament.

And now, by the *st.* 21 *H.* 8. 13. all spiritual persons, promoted to any archdeaconry, deanry, or other dignity in a cathedral, or other church, or beneficed with any parsonage or vicarage, shall be personally resident on such dignity or benefice; and if he absent himself wilfully one month together, or two months at several times in one year, and keep not residence at one of his dignities, prebends, or benefices, he shall forfeit 10*l.* a moiety to the king, a moiety to him that will sue, &c.

So, he ought to reside at the parsonage-house; for if he lets it, tho' he dwells in another house in the same parish, it will be within the statute. *R.* 6 *Co.* 21. *b.* *Mo.* 540. *Cro. El.* 590. *Semb.* 2 *Brownl.* 54.

Tho' he occupies the parsonage by a servant and does not let it, but dwells in another house. *Semb.* 2 *Brownl.* 54.

By the *st.* 13 *El.* 20. no lease, &c. shall be good longer than the lessor is resident, without absence above 80 days in one year. *Vide Estates*, (G 4.)

So, if a man has a vicarage in a cathedral, and another benefice with cure; it is not sufficient that he be resident upon his vicarage, for that is only nominal: and where a person has two benefices, one only nominal, he ought to reside upon the real benefice. *R.* 27 *H.* 8. 10. *b.*

An information, or debt by *qui tam*, &c. lies upon the statute for non-residence. *Vide Pleader*, (2 S 23.)

But the *st.* 21 *H.* 8. 13. as to non-residence, does not extend to any spiritual person in the king's service beyond sea, or in pilgrimage,
going

going or returning, nor to a scholar abiding for study at any university within the realm or without, nor to a chaplain of the king, queen, or any of their children, brethren, or sisters, during attendance in their households, nor to any chaplain of any archbishop, bishop, lord spiritual or temporal, duchess, &c. lord chancellor, treasurer, chamberlain, or steward of the household, treasurer, or comptroller of the household, knight of the garter, chief justice of the King's Bench, warden of the ports, master of the rolls, king's secretary, dean of the chapel, or almoner, during attendance without fraud, in their houses.

Nor, to the master of the rolls, dean of the arches, chancellor, or commissary of any archbishop or bishop, masters in *Chancery*, advocates in the arches during their offices, nor to a spiritual person bound to daily appearance by injunction of *Chancery*, or the king's counsel, to answer the law: and the king may give licence of non-residence to any of his own chaplains.

Nor, by the *st.* 25 *H.* 8. 16. to the chaplain of any judge, chancellor, or chief baron of the *Exchequer*, attorney or solicitor general, attending in his house, or on his person.

Nor, by the *st.* 33 *H.* 8. 28. to the chaplain of the chancellor of *Lancaster*, chancellor of the augmentations, groom of the stole, &c.

So, the *st.* 21 *H.* 8. 13. does not extend to a spiritual person not wilfully absent: as, if there be no house upon the rectory. *6 Co.* 21. *b.*

And therefore, an information is bad, if it says *absentavit*, omitting *voluntariè*. *R. Cro. El.* 100.

If he be imprisoned, without covin. *6 Co.* 21. *b.*

If he be removed by advice of physicians, without fraud, for recovery of his health. *R. 6 Co.* 21. *b.* *R. 2 Bul.* 18.

So, the statute does not extend to an archbishop or bishop.

So, the statute does not extend to him, who resides upon the one or the other of his benefices or dignities, if he has a dispensation.

[Nor, to a curate of an augmented curacy by queen *Anne's* bounty. *Jenkinson v. Thomas*, *B. R. E.* 32 *Geo.* 3. 4 *T. R.* 665.]

But a gospeller, or a vicar in a cathedral, is not a benefice or dignity, which excuses his residence. *Per tunc J. Cro. El.* 663.

[Information on 21 *H.* 8. *c.* 13. lies not at the assizes. *R. on Demurrer. Garland v. Burton*, *M.* 12 *G.* 2. *Str.* 1103. *Andr.* 291.]

Yet by the *st.* 28 *H.* 8. 13. no person above 40 shall be excused from residence in respect of his studies in the university, unless the chancellor, vice-chancellor, commissary, heads of houses, doctors of the chair, readers of divinity in the schools, or of law, physic, &c. professors of Hebrew, Greek, &c. and persons attending for their degrees.

Nor, under 40, unless they attend lectures, disputations, and exercises according to the statute.

(N 5.) By Plurality.

(N 5.) *When the first church shall be void by it.* By the council of *Lateran* 1215. 29. *Siquis beneficium cum curâ recepit, si prius tale habuerit, eo sit ipso jure privatus: et si in eadem ecclesiâ plures habeat dignitates aut parsonat. etiamsi curam non habeant, poterit tamen dispensari, &c.*

AND

And therefore, by the canon law received here, if any having a benefice with cure, accepts another with cure, the first shall be void. *R. 4 Co. 75.*

Tho' the second benefice be under 8*l. per ann.* *Acc. Vau. 131. Jon. 404.*

And thereupon the patron, if he will, may present without sentence of deprivation. *R. 4 Co. 75. b. R. Cro. Car. 357. Jon. 337.*

And a subsequent dispensation pursuant to the *st. 25 H. 8. 21.* is too late, and does not take away the right vested in the patron to present. *R. Jon. 404.*

So now, by the *st. 21 H. 8. 13:* if any, having a benefice with cure of souls of 8*l. per ann.* or above, take any other with cure, and be instituted and inducted, immediately after the first shall be void, and any dispensation, &c. shall be void.

The valuation shall be estimated according to the value returned. *26 H. 8.*

So, the first benefice shall be void upon institution to the second, before induction; tho' a lapse does not incur till six months after induction. *Mo. 448.*

[A church above 8*l.* is so void on institution to second living, that patron may present immediately. *Wolferstan v. Bishop of Lincoln, T. 3 G. 3. 2 Wilf. 174. T. 4 G. 3. 3 B. M. 1504.*]

[It is also so void, that a grant of the advowson or next presentation made after it, is void. *Ibid.*]

And it shall be void, tho' he procures the second benefice to be united to the first, after his institution to the first. *Hob. 158.*

Tho' he subscribes the 39 articles, but afterwards does not read them within two months; whereby the second benefice is also void. *R. Vau. 131. Vide post. (N 7. 10.)*

So, if he takes a dignity, as a deanry, archdeaconry, &c. without a dispensation. *Semb. 1 Leo. 316. Vide post. (N 6.)*

Or, if a dean takes another dignity.

Or, a dean, prebendary, &c. takes another prebend in the same church.

So, it shall be void to all intents: for he cannot sue for tithes. *R. Cro. Car. 357. Jon. 337, 8. 340.*

Otherwise, till deprivation, where the former is under 8*l. per ann.*

So, a pardon by the king of his title by lapse does not restore him. *R. Jon. 339.*

So, if the first benefice be under 8*l. per ann.* it will be void by the canon law, if he takes a second without a dispensation: and therefore he may be deprived. *Vide supra.*

How a dispensation for a plurality may be granted, *vide in Prærogative, (D 18, &c.)—Vide post. (N 8.)*

(N 6.) *When not. If he takes a dignity.* But if a man, having a benefice with cure of 8*l. per ann.* with a dispensation, takes a dignity which has no cure, the first is not void: as, if he be made dean of a cathedral. By the *st. 21 H. 8. 13.*

Or, treasurer, chancellor, prebendary, chaunter of a cathedral or collegiate church. By the *st. 21 H. 8. 13.*

Or,

Or, archdeacon.

So, by *the same statute*, if he takes a parsonage that hath a vicar endowed, or benefice appropriate.

So, if a man, having a benefice with cure, be created a bishop, the benefice is not void by force of that statute, tho' it be by the common law. *Hob. 157.*

Neither will it be void by the common law, till he be consecrated a bishop. *Pal. 346.*

(N 7.) *Or is not incumbent of the second.*] So, if he is not complete incumbent of the second benefice: as, if a man, having a benefice with cure, takes another benefice with cure, and is inducted, but does not subscribe the thirty-nine articles; the former is not void, for he never was possessor of the second. *Wat. c. 3. Vide ante, (N 5.)—Post. (N 10.)*

So, if he be presented to the second by simony. *Wat. c. 3.*

Or, does not subscribe the articles before the ordinary himself. *Wat. c. 3.*

(N 8.) *If he has a qualification. Who may have it.*] So, by the *st. 21 H. 8. 13.* brothers, and sons of any temporal lord, or knight, born in wedlock, may purchase a dispensation, to take two parsonages or benefices with cure.

And doctors, and bachelors of divinity, or laws, admitted to the said degrees in any of the universities of this realm, and not by grace only.

So, by *the same statute*, all spiritual men of the king's council may have a dispensation for three benefices with cure.

And all the chaplains of the king, queen, or any of the king's children, brethren, sisters, uncles, or aunts, may purchase dispensation to take two parsonages or benefices with cure.

So, may six chaplains of any archbishop, or duke.

And five chaplains of any marquis, or earl, and four chaplains of any viscount, or bishop.

And three chaplains of the chancellor of *England*, of any baron, or knight of the garter.

And two chaplains of any duchess, marchioness, countess, or baroness, being widows.

And two chaplains of the king's treasurer, and comptroller of his house, secretary, dean of his chapel, almoner, master of the rolls.

And one chaplain of the chief justice of the King's Bench, and warden of the *Cinque Ports*.

So, by the *st. 26 H. 8. 14.* a bishop suffragan.

So, if the king himself presents his chaplain, it is sufficient, without other dispensation: for that imports a dispensation, which the king as supreme ordinary may grant. *R. 1 Sal. 161. D. Sav. 135.*

So, a chaplain of a duke, marquis, earl, baron, &c. being under the age of discretion, and in ward of him, who has chaplains, may be retained, and qualified by such retainer.

And a qualification before impleading, tho' it be not before the taking of the second benefice, is sufficient. *R. Sav. 135.*

If a peer, &c. retains above his number, those first retained only shall be qualified. *R. Sav. 101.*

If all be retained together, those first advanced.

And the retainer of any one after his number does not avail, tho' he be first advanced.

Tho' a former chaplain be advanced, and afterwards dismissed. *R. Sav. 79.*

(N 9.) *Who not.*] But the presentee of a subject, tho' qualified, cannot take a plurality, without a dispensation before his institution to the second benefice. *R. 1 Sal. 161.*

So, a peer, &c. who has several capacities, cannot qualify more than his highest capacity allows.

If a duchess, &c. marries a duke, &c. she cannot afterwards retain, during coverture.

But her chaplains, before retained, continue, if not discharged by the husband.

If a peer, &c. retains above his number, the retainer shall be void; tho' a former chaplain dies, if he does not retain him *de novo* after the death of the other. *Per three J. 1 And. 200.*

So, a retainer before he be a peer, &c. is void, tho' the chaplain afterwards continues in service, if he be not retained *de novo*.

So, a retainer becomes void, if, before his advancement, his master loses his office, &c. or dies, or is attainted.

So, a retainer is of no avail, if he be dismissed before his advancement.

So, a king's chaplain extraordinary is not qualified to take a second benefice. *R. 1 Sal. 161, 2.*

Nor, a chaplain retained, but not by letters testimonial under hand and seal: as, if they be only signed, or only sealed. *Godb. 41.*

So, if retained only by *parol*, tho' he officiates in the family as chaplain. *D. cont. Sav. 135.*

So, if the number which he may retain be advanced, the retainer of another afterwards does not give a qualification. *R. 1 And. 200.*

So, the son of a bishop is not qualified to take a dispensation for two benefices.

Nor, the bastard of a temporal lord.

Nor, the son of a baronet; for it is a dignity created since the statute.

(N 10.) By not reading the thirty-nine Articles, &c.

So, by the *st. 13 El. 12.* if a layman, or a deacon, under the age of twenty-three, be presented and admitted to a benefice with cure, or if any be admitted to a benefice with cure of *30l. per ann.* in the queen's books, unless he be bachelor in divinity, or preacher allowed by some bishop, or university, or if any be admitted to a benefice with cure, who shall not have first subscribed the thirty-nine articles in the presence of the ordinary, the admission, &c. shall be void, or if he shall not within two months after his induction publicly read the articles in the church in time of common prayer there, and declare his assent thereto, he shall be *ipso facto* deprived. *Vide Ecclesiastical Persons, (C 8.)*

By not reading the articles the church is void, without sentence of deprivation. *R. Cro. El. 680.*

[By *ſt. 23 G. 2. c. 28.* Persons reading the articles, and declaring their assent thereto, at the time of reading morning and evening prayer, and declaring assent thereto, are within 13 *Eliz. c. 12.* tho' not done in two months after induction.]

(N 11.) Notice of the Avoidance to the Patron.

If a church becomes void by resignation or deprivation, a lapse does not incur till notice of the avoidance given to the patron, and six months afterwards elapsed. *Vide ante, (H 9.--N 1.)*

So, if it becomes void by not reading the thirty-nine articles. By a clause in the *ſt. 13 El. 12.*

So, if a lay-patron presents, and the ordinary refuses him, he ought to give notice of the refusal to the patron, if he be refused for a cause within his proper conuſance, or of which the judgment belongs to him: as, that he was an heretic, schismatic, &c. *Vide ante (I).*

(N 12.) The Writ *de vi Laicâ amovendâ.*

If a clerk be by force of laymen kept out of his church or parsonage-house, upon application to *Chancery*, he shall have a writ *de Vi Laicâ amovendâ*, by which the sheriff shall take the *poſſe comitatus*, and shall attach all who resist, and amove the force. *F. N. B. 55. A.*

So, upon the bishop's certificate of such force, a writ shall issue. *F. N. B. 54. D.*

So, the writ shall issue, if the presentee of the king be prevented of his possession. *F. N. B. 54. F.*

Or, the archdeacon be prevented, by force, from making induction.

The writ *de Vi Laicâ amovendâ* shall be returnable in *E. R.* or *C. B.* *F. N. B. 54. G.*

Or, it shall not be returnable, at the election of him who sues it. *F. N. B. 54. G.*

And upon such writ the sheriff ought to remove the force, and put the incumbent into the enjoyment of his possession. *F. N. B. 54. H.*

So, he may commit the offenders to gaol, and return his writ to *B. R.*, where they shall be fined. *Mo. 782.*

And if the sheriff does not serve nor return the writ, an *alias pluries*, and attachment lie against him, directed to the coroners. *F. N. B. 54. E.*

But the sheriff shall not remove the incumbent, whether his possession be by right or by wrong. *F. N. B. 54. H.*

[And if he does the incumbent shall have a writ directed to the sheriff, that without delay he may make him amends. *F. N. B. 54. H.*]

[And if he does not do so, an *alias pluries*, and attachment lie against him. *F. N. B. 54. H.*]

So, upon an *ſdavit* of it in *Chancery*, restitution shall be awarded. *R. Mo. 782.*

And in such case the writ shall be returnable in *Chancery*, not in *B. R.* *R. Mo. 782.*

ESQUIRE

Vide Dignity, (B 8.)

ESSOINE.

Vide Exoine.

THE END OF THE THIRD VOLUME.

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